CASE NO. 18-14163

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ADVANCED MASONRY ASSOCIATES, LLC
d/b/a Advanced Masonry Services

(Petitioner/Appellant)

vs.

NATIONAL LABOR RELATIONS BOARD

(Respondent/Appellee)

A Petition for Review of an Order of the National Labor Relations Board

N.L.R.B. Case No. 12-CA-22114

Tab No: 96

EXHIBIT

A

FORM NLRB-502 (RC)
(4-15)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

RC PETITION

DO NOT WRITE IN THIS SPACE	
Case No. 12-RC-175179	Date Filed 4/29/16

INSTRUCTIONS: Unless e-Filed using the Agency's website, www.nlrb.gov, submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.

1. PURPOSE OF THIS PETITION: RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees. The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

2a. Name of Employer	2b. Address(es) of Establishment(s) involved (Street and number, city, State, ZIP code)
Advanced Masonry Systems	5403 Ashton Ct; Sarasota, FL 34233

3a. Employer Representative – Name and Title	3b. Address (if same as 2b – state same)
Ronald D. Karp	same

3c. Tel. No.	3d. Cell No.	3e. Fax No.	3f. E-Mail Address
(941) 926-3155			Ron@advmasonry.com

4a. Type of Establishment (Factory, mine, wholesaler, etc.)	4b. Principal product or service	4c. City and State where unit is located:
Construction	Masonry	Tampa, FL

5b. Description of Unit Involved

Included: All bricklayers employed by the Employer

Excluded: All office and clerical employees, professional employees, guards and supervisors as defined in the Act.

6a. No. of Employees in Unit: Approximately 25

6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? Yes [✓] No [ ]

Check One:

[ ] 7a. Request for recognition as Bargaining Representative was made on (Date) _____ and Employer declined recognition on or about _____ (Date) (If no reply received, so state).

[✓] 7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act.

8a. Name of Recognized or Certified Bargaining Agent (If none, so state).	8b. Address
Bricklayers and Allied Craftworkers Local 8 Southeast	2922 Sidco Drive; Nashville, TN 37204

8c. Tel No.	8d Cell No.	8e. Fax No.	8f. E-Mail Address
615-255-6000	251-327-6964	615-730-5662	jsmith@becsoutheast.org

8g. Affiliation, if any	8h. Date of Recognition or Certification	8i. Expiration Date of Current or Most Recent Contract, if any (Month, Day, Year)
International Union of Bricklayers and Allied Craftworkers, AFL-CIO	May 1988	April 30, 2017

9. Is there now a strike or picketing at the Employer's establishment(s) involved? No If so, approximately how many employees are participating? _____

(Name of labor organization) _____, has picketed the Employer since (Month, Day, Year) _____.

10. Organizations or individuals other than Petitioner and those named in items 8 and 9, which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5b above. (If none, so state)

None

10a. Name	10b. Address	10c. Tel. No.	10d. Cell No.
		10e. Fax No.	10f. E-Mail Address

11. Election Details: If the NLRB conducts an election in this matter, state your position with respect to any such election.

11a. Election Type: [ ] Manual [✓] Mail [ ] Mixed Manual/Mail

11b. Election Date(s):	11c. Election Time(s):	11d. Election Location(s):
May 25, 2016	Not Applicable	Not Applicable

12a. Full Name of Petitioner (including local name and number)	12b. Address (street and number, city, state, and ZIP code)
Bricklayers and Allied Craftworkers Local 8 Southeast	2922 Sidco Drive; Nashville, TN 37204

12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (If none, so state)
International Union of Bricklayers and Allied Craftworkers, AFL-CIO

12d. Tel No.	12e. Cell No.	12f. Fax No.	12g. E-Mail Address
615-255-6000	251-327-6964	615-730-5662	jsmith@becsoutheast.org

13. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.

13a. Name and Title	13b. Address (street and number, city, state, and ZIP code)
Kimberly C. Walker, Legal Counsel	14438 Scenic Hwy, 98; Fairhope, AL 36532

13c. Tel No.	13d. Cell No.	13e. Fax No.	13f. E-Mail Address
251-928-6461	251-510-8907	251-928-6461	kwalker@kcwlawfirm.com

I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.

Name (Print)	Signature	Title	Date
M. Jay Smith	M. Jay Smith	President	April 29, 2016

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

CASE NO. 18-14163

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ADVANCED MASONRY ASSOCIATES, LLC
d/b/a Advanced Masonry Services

(Petitioner/Appellant)

vs.

NATIONAL LABOR RELATIONS BOARD

(Respondent/Appellee)

A Petition for Review of an Order of the National Labor Relations Board

N.L.R.B. Case No. 12-CA-22114

Tab No: 97

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

ADVANCED MASONRY SYSTEMS **Employer** **and** **BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 8** **Petitioner**	**Case 12-RC-175179**

NOTICE OF REPRESENTATION HEARING

The Petitioner filed the attached petition pursuant to Section 9(c) of the National Labor Relations Act. It appears that a question affecting commerce exists as to whether the employees in the unit described in the petition wish to be represented by a collective-bargaining representative as defined in Section 9(a) of the Act.

YOU ARE HEREBY NOTIFIED that, pursuant to Sections 3(b) and 9(c) of the Act, at 10:00 AM on **Monday, May 9, 2016** and on consecutive days thereafter until concluded, at the National Labor Relations Board offices located at Hearing Room, 201 E Kennedy Blvd, Suite 530, Tampa, FL 336602, a hearing will be conducted before a hearing officer of the National Labor Relations Board. At the hearing, the parties will have the right to appear in person or otherwise, and give testimony.

YOU ARE FURTHER NOTIFIED that, pursuant to Section 102.63(b) of the Board's Rules and Regulations, Advanced Masonry Systems must complete the Statement of Position and file it and all attachments with the Regional Director and serve it on the parties listed on the petition such that is received by them by no later than **noon** Eastern time on May 6, 2016. The Statement of Position may be E-Filed but, unlike other E-Filed documents, must be filed by noon Eastern on the due date in order to be timely. If an election agreement is signed by all parties and returned to the Regional Office before the due date of the Statement of Position, the Statement of Position is not required to be filed.

Dated: April 29, 2016

Margaret J. Diaz, Regional Director
National Labor Relations Board, Region 12
201 E Kennedy Blvd., Ste. 530
Tampa, FL 33602-5824

CASE NO. 18-14163

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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(Respondent/Appellee)

A Petition for Review of an Order of the National Labor Relations Board

N.L.R.B. Case No. 12-CA-22114

Tab No: 98

EXHIBIT

F

FORM NLRB-760
(12-82)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

ADVANCED MASONRY ASSOCIATES, L.L.C. d/b/a ADVANCED MASONRY SYSTEMS

Employer

and

BRICKLAYERS AND ALLIED CRAFTWORKERS LOCAL 8 SOUTHEAST

Petitioner

Case: 12-RC-175179

Date Filed 4/29/16

Date Issued JUNE 9, 2016

Type of Election: *(Check one:)*
- ☒ Stipulation
- ☐ Board Direction
- ☐ Consent Agreement
- ☐ RD Direction

Incumbent Union *(Code)*

(If applicable check either or both:)
- ☐ 8 (b) (7)
- ☒ Mail Ballot

TALLY OF MAIL BALLOTS

The undersigned agent of the Regional Director certifies that the results of the tabulation of ballots cast in the election held in the above case, and concluded on the date indicated above, were as follows.

1. Approximate number of eligible voters.	110
2. Number of Void ballots	2
3. Number of Votes cast for PETITIONER.	16
~~4. Number of Votes cast for~~.	1
~~5. Number of Votes cast for~~ .	1
6. Number of Votes cast against participating labor organization(s).	16
7. Number of Valid votes counted (sum of 3, 4 ~~,5,~~ and 6)	32
8. Number of Challenged ballots	22
9. Number of Valid votes counted plus challenged ballots (sum of 7 and 8)	54

10. Challenges are ~~(not)~~ sufficient in number to affect the results of the election.

11. A majority of the valid votes counted plus challenged ballots (item 9) has (not) been cast for PETITIONER

For the Regional Director
Region 12

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For EMPLOYER
ADVANCED MASONRY ASSOCIATES, L.L.C. d/b/a ADVANCED MASONRY SYSTEMS

For

For PETITIONER
BRICKLAYERS AND ALLIED CRAFTWORKERS LOCAL 8 SOUTHEAST

For

* U.S.G.P.O.: 1994 – 384-162

CASE NO. 18-14163

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ADVANCED MASONRY ASSOCIATES, LLC
d/b/a Advanced Masonry Services

(Petitioner/Appellant)

vs.

NATIONAL LABOR RELATIONS BOARD

(Respondent/Appellee)

A Petition for Review of an Order of the National Labor Relations Board

N.L.R.B. Case No. 12-CA-22114

Tab No: 99

EXHIBIT

J

FORM NLRB-4168
(12-82)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

ADVANCED MASONRY ASSOCIATES, L.L.C.
d/b/a ADVANCED MASONRY SYSTEMS
Employer

and

BRICKLAYERS AND ALLIED
CRAFTWORKERS LOCAL 8 SOUTHEAST
Petitioner

Case 12-RC-175179 | Date Filed: 4/29/16

Date Issued **November 17, 2016**

Type of Election: (*Check one:*)

- ☐ Consent Agreement
- ☒ Stipulation
- ☐ Board Direction
- ☐ RD Direction

Also check box below where appropriate:)

☐ 8 (b) (7)

REVISED TALLY OF BALLOTS
(READ)

The undersigned agent of the Regional Director certifies that the resolution of the challenged ballots in accordance with the Stipulation executed by the parties and approved by the Regional Director on November 17, 2016, is as follows:

		Original Tally	Challenged Ballots Counted	Final Tally
Approximate number of eligible voters		110		
Number of Void ballots		2		2
Number of Votes cast for	PETITIONER	16		16
~~Number of Votes cast for~~				
~~Number of Votes cast for~~				
Number of Votes cast against participating labor organization(s)		16		16
Number of Valid votes counted		32		32
Number of undetermined challenged ballots		22		14
Number of Valid votes counted plus challenged ballots		54		46
Number of Sustained challenges *(voters ineligible)*	8			

The remaining undetermined challenged ballots, if any, shown in the Final Tally column are ~~(not)~~ sufficient to affect the results of the election.

A majority of the valid votes plus challenged ballots as shown in the Final Tally column has (not) been cast for

For the Regional Director Region 12

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that this counting and tabulating, and the compilation of the Final Tally, were fairly and accurately done, and that the results were as indicated above. We also acknowledge service of this Tally.

For EMPLOYER
ADVANCED MASONRY ASSOCIATES, L.L.C. d/b/a ADVANCED MASONRY SYSTEMS

For _____

For PETITIONER
BRICKLAYERS AND ALLIED CRAFTWORKERS LOCAL 8 SOUTHEAST

For _____

* U.S.G.P.O.: 1985–0-488-357/49050

CASE NO. 18-14163

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ADVANCED MASONRY ASSOCIATES, LLC
d/b/a Advanced Masonry Services

(Petitioner/Appellant)

vs.

NATIONAL LABOR RELATIONS BOARD

(Respondent/Appellee)

A Petition for Review of an Order of the National Labor Relations Board

N.L.R.B. Case No. 12-CA-22114

Tab No: 100

EXHIBIT

X

FORM NLRB-4168
(12-82)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

ADVANCED MASONRY ASSOCIATES, LLC
d/b/a ADVANCED MANSONRY SYSTEMS
Employer

and

BRICKLAYERS AND ALLIED
CRAFTWORKERS, LOCAL 8 SOUTHEAST
Petitioner

Case 12-RC-175179 | Date Filed: 4/29/16

Date Issued **April 23, 2018**

Type of Election: (*Check one:*)
- ☐ Consent Agreement
- ☐ Stipulation
- ☒ Board Direction
- ☐ RD Direction

Also check box below where appropriate:)
- ☐ 8 (b) (7)

FINAL REVISED TALLY OF BALLOTS
(READ)

The undersigned agent of the Regional Director certifies that the resolution of the challenged ballots in accordance with the Board's Decision, Order and Direction issued on April 13, 2018

		Revised Tally	Challenged Ballots Counted	Final Tally
Approximate number of eligible voters		110		
Number of Void ballots		2	0	2
Number of Votes cast for	PETITIONER	16	9	25
~~Number of Votes cast for~~				
~~Number of Votes cast for~~				
Number of Votes cast against participating labor organization(s)		16	0	16
Number of Valid votes counted		32		41
Number of undetermined challenged ballots		14		0
Number of Valid votes counted plus challenged ballots		46		41
Number of Sustained challenges *(voters ineligible)*				5

The remaining undetermined challenged ballots, if any, shown in the Final Tally column are (not) sufficient to affect the results of the election.

A majority of the valid votes plus challenged ballots as shown in the Final Tally column has (not) been cast for

PETITIONER

For the Regional Director Region 12

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that this counting and tabulating, and the compilation of the Final Tally, were fairly and accurately done, and that the results were as indicated above. We also acknowledge service of this Tally.

For EMPLOYER
ADVANCED MASONRY ASSOCIATES, LLC
d/b/a ADVANCED MANSONRY SYSTEMS

For PETITIONER
BRICKLAYERS AND ALLIED CRAFTWORKERS,
LOCAL 8 SOUTHEAST

* U.S.G.P.O.: 1985–0-488-357/49050

CASE NO. 18-14163

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ADVANCED MASONRY ASSOCIATES, LLC
d/b/a Advanced Masonry Services

(Petitioner/Appellant)

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NATIONAL LABOR RELATIONS BOARD

(Respondent/Appellee)

A Petition for Review of an Order of the National Labor Relations Board

N.L.R.B. Case No. 12-CA-22114

Tab No: 101

EXHIBIT

B

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

STIPULATED ELECTION AGREEMENT

Advanced Masonry Associates, L.L.C.
d/b/a Advanced Masonry Systems **Case 12-RC-175179**

The parties **AGREE AS FOLLOWS:**

1. PROCEDURAL MATTERS. The parties waive their right to a hearing and agree that any notice of hearing previously issued in this matter is withdrawn, that the petition is amended to conform to this Agreement, and that the record of this case shall include this Agreement and be governed by the Board's Rules and Regulations.

2. COMMERCE. The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act and a question affecting commerce has arisen concerning the representation of employees within the meaning of Section 9(c).

Advanced Masonry Associates, L.L.C. d/b/a Advanced Masonry Systems, a Florida limited liability corporation, is a commercial masonry and concrete sub-contractor engaged in the construction industry, primarily in the State of Florida. During the past 12-month period ending April 29, 2016, a representative period of time, the Employer purchased and received goods and supplies from outside the State of Florida in excess of $50,000.00, which goods and supplies were shipped directly to the Employer's place of business and facilities in the State of Florida.

3. LABOR ORGANIZATION. The Petitioner is an organization in which employees participate, and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work and is a labor organization within the meaning of Section 2(5) of the Act.

4. ELECTION. The election will be conducted by mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit from the office of the National Labor Relations Board, Region 12, on May 25, 2016. Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 12 office by close of business on June 8, 2016. The mail ballots will be counted at the Region 12 office located at 201 E Kennedy Blvd Ste 530, Tampa, FL 33602-5824 at 10:00 a.m. on June 9, 2016.

To help avoid the untimely return of a ballot, any person who has not received a ballot by June 1, 2016, or otherwise requires a duplicate mail ballot kit should contact the Region 12 office in order to arrange for another mail ballot kit to be sent to that employee.

5. UNIT AND ELIGIBLE VOTERS. The following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> INCLUDED: All bricklayers and/or masons employed by the Employer.
> EXCLUDED: All other employees, office and clerical employees, professional employees, guards and supervisors as defined in the Act.

Those eligible to vote in the election are employees in the above unit who were employed during the **payroll period ending April 29, 2016**, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off.

Initials: _____

Also eligible to vote are all employees in the unit(s) who either (1) were employed a total of 30 working days or more within the 12 months preceding the election eligibility date or (2) had some employment in the 12 months preceding the election eligibility date and were employed 45 working days or more within the 24 months immediately preceding the election eligibility date. However, employees meeting either of those criteria who were terminated for cause or who quit voluntarily prior to the completion of the last job for which they were employed, are not eligible.

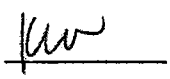
Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, employees engaged in an economic strike which commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Employees who are otherwise eligible but who are in the military services of the United States may vote by mail as described above in paragraph 4.

Ineligible to vote are (1) employees who have quit or been discharged for cause after the designated payroll period for eligibility, (2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and (3) employees engaged in an economic strike which began more than 12 months before the election date who have been permanently replaced.

6. VOTER LIST. Within 2 business days after the Regional Director has approved this Agreement, the Employer must provide to the Regional Director and all of the other parties a voter list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available personal home and cellular telephone numbers) of all eligible voters. The Employer must also include, in a separate section of that list, the same information for those individuals whom the parties have agreed should be permitted to vote subject to challenge. The list must be filed in common, everyday electronic file formats that can be searched. Unless otherwise agreed to by the parties, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. The font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. When feasible, the list must be filed electronically with the Regional Director and served electronically on the parties. The Employer must file with the Regional Director a certificate of service of the list on all parties.

7. THE BALLOT. The Regional Director, in his or her discretion, will decide the language(s) to be used on the election ballot. All parties should notify the Region as soon as possible of the need to have the Notice of Election and/or ballots translated. The question on the ballot will be "Do you wish to be represented for purposes of collective bargaining by Bricklayers and Allied Craftworkers Local 8 Southeast?" The choices on the ballot will be "Yes" or "No"

8. NOTICE OF ELECTION. The Regional Director, in his or her discretion, will decide the language(s) to be used on the Notice of Election. The Employer must post copies of the Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted, at least three (3) full working days prior to 12:01 a.m. of the day of the election. The Employer must also distribute the Notice of Election electronically, if the Employer customarily communicates with employees in the unit electronically. Failure to post or distribute the Notice of Election as required shall be grounds for setting aside the election whenever proper and timely objections are filed.

Initials: 

9. ACCOMMODATIONS REQUIRED. All parties should notify the Region as soon as possible of any voters, potential voters, or other participants in this election who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.503, and who in order to participate in the election need appropriate auxiliary aids, as defined in 29 C.F.R. 100.503, and request the necessary assistance.

10. OBSERVERS. Each party may station an equal number of observers at the ballot count to assist in the election, to challenge the eligibility of voters, and to verify the tally.

11. TALLY OF BALLOTS. Upon conclusion of the election, the ballots will be counted and a tally of ballots prepared and immediately made available to the parties.

12. POSTELECTION AND RUNOFF PROCEDURES. All procedures after the ballots are counted shall conform with the Board's Rules and Regulations.

Advanced Masonry Associates, L.L.C.
d/b/a Advanced Masonry Systems
(Employer)

By _____
(Name) (Date)

Bricklayers and Allied Craftworkers
Local 8 Southeast
(Petitioner)

By [signature] 5/6/2016
(Name) (Date)

_____
(Union)

By _____
(Name) (Date)

Recommended: [signature] MAY 6, 2016
MARK T HEATON, Field Examiner
(Date)

Date approved: 5/6/2016

[signature] IAF
Regional Director, Region 12
National Labor Relations Board

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

STIPULATED ELECTION AGREEMENT

Advanced Masonry Associates, L.L.C.
d/b/a Advanced Masonry Systems **Case 12-RC-175179**

The parties **AGREE AS FOLLOWS:**

1. PROCEDURAL MATTERS. The parties waive their right to a hearing and agree that any notice of hearing previously issued in this matter is withdrawn, that the petition is amended to conform to this Agreement, and that the record of this case shall include this Agreement and be governed by the Board's Rules and Regulations.

2. COMMERCE. The Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the National Labor Relations Act and a question affecting commerce has arisen concerning the representation of employees within the meaning of Section 9(c).

Advanced Masonry Associates, L.L.C. d/b/a Advanced Masonry Systems, a Florida limited liability corporation, is a commercial masonry and concrete sub-contractor engaged in the construction industry, primarily in the State of Florida. During the past 12-month period ending April 29, 2016, a representative period of time, the Employer purchased and received goods and supplies from outside the State of Florida in excess of $50,000.00, which goods and supplies were shipped directly to the Employer's place of business and facilities in the State of Florida.

3. LABOR ORGANIZATION. The Petitioner is an organization in which employees participate, and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work and is a labor organization within the meaning of Section 2(5) of the Act.

4. ELECTION. The election will be conducted by mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit from the office of the National Labor Relations Board, Region 12, on May 25, 2016. Voters must return their mail ballots so that they will be received in the National Labor Relations Board, Region 12 office by close of business on June 8, 2016. The mail ballots will be counted at the Region 12 office located at 201 E Kennedy Blvd Ste 530, Tampa, FL 33602-5824 at 10:00 a.m. on June 9, 2016.

To help avoid the untimely return of a ballot, any person who has not received a ballot by June 1, 2016, or otherwise requires a duplicate mail ballot kit should contact the Region 12 office in order to arrange for another mail ballot kit to be sent to that employee.

5. UNIT AND ELIGIBLE VOTERS. The following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> INCLUDED: All bricklayers and/or masons employed by the Employer.
> EXCLUDED: All other employees, office and clerical employees, professional employees, guards and supervisors as defined in the Act.

Those eligible to vote in the election are employees in the above unit who were employed during the **payroll period ending April 29, 2016**, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off.

Initials

Also eligible to vote are all employees in the unit(s) who either (1) were employed a total of 30 working days or more within the 12 months preceding the election eligibility date or (2) had some employment in the 12 months preceding the election eligibility date and were employed 45 working days or more within the 24 months immediately preceding the election eligibility date. However, employees meeting either of those criteria who were terminated for cause or who quit voluntarily prior to the completion of the last job for which they were employed, are not eligible.

Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, employees engaged in an economic strike which commenced less than 12 months before the election date, who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Employees who are otherwise eligible but who are in the military services of the United States may vote by mail as described above in paragraph 4.

Ineligible to vote are (1) employees who have quit or been discharged for cause after the designated payroll period for eligibility, (2) employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and (3) employees engaged in an economic strike which began more than 12 months before the election date who have been permanently replaced.

6. VOTER LIST. Within 2 business days after the Regional Director has approved this Agreement, the Employer must provide to the Regional Director and all of the other parties a voter list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available personal home and cellular telephone numbers) of all eligible voters. The Employer must also include, in a separate section of that list, the same information for those individuals whom the parties have agreed should be permitted to vote subject to challenge. The list must be filed in common, everyday electronic file formats that can be searched. Unless otherwise agreed to by the parties, the list must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. The font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. When feasible, the list must be filed electronically with the Regional Director and served electronically on the parties. The Employer must file with the Regional Director a certificate of service of the list on all parties.

7. THE BALLOT. The Regional Director, in his or her discretion, will decide the language(s) to be used on the election ballot. All parties should notify the Region as soon as possible of the need to have the Notice of Election and/or ballots translated. The question on the ballot will be "Do you wish to be represented for purposes of collective bargaining by Bricklayers and Allied Craftworkers Local 8 Southeast?" The choices on the ballot will be "Yes" or "No"

8. NOTICE OF ELECTION. The Regional Director, in his or her discretion, will decide the language(s) to be used on the Notice of Election. The Employer must post copies of the Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted, at least three (3) full working days prior to 12:01 a.m. of the day of the election. The Employer must also distribute the Notice of Election electronically, if the Employer customarily communicates with employees in the unit electronically. Failure to post or distribute the Notice of Election as required shall be grounds for setting aside the election whenever proper and timely objections are filed.

Initials: 

9. ACCOMMODATIONS REQUIRED. All parties should notify the Region as soon as possible of any voters, potential voters, or other participants in this election who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.503, and who in order to participate in the election need appropriate auxiliary aids, as defined in 29 C.F.R. 100.503, and request the necessary assistance.

10. OBSERVERS. Each party may station an equal number of observers at the ballot count to assist in the election, to challenge the eligibility of voters, and to verify the tally.

11. TALLY OF BALLOTS. Upon conclusion of the election, the ballots will be counted and a tally of ballots prepared and immediately made available to the parties.

12. POSTELECTION AND RUNOFF PROCEDURES. All procedures after the ballots are counted shall conform with the Board's Rules and Regulations.

Advanced Masonry Associates, L.L.C.
d/b/a Advanced Masonry Systems
(Employer)

By _____ 5/6/16
(Name) (Date)

Bricklayers and Allied Craftworkers
Local 8 Southeast
(Petitioner)

By _____
(Name) (Date)

_____
(Union)

By _____
(Name) (Date)

Recommended: _____ May 6, 2016
MARK T HEATON, Field Examiner
(Date)

Date approved: 5/6/2016

_____ IAF
Regional Director, Region 12
National Labor Relations Board

CASE NO. 18-14163

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ADVANCED MASONRY ASSOCIATES, LLC
d/b/a Advanced Masonry Services

(Petitioner/Appellant)

vs.

NATIONAL LABOR RELATIONS BOARD

(Respondent/Appellee)

A Petition for Review of an Order of the National Labor Relations Board

N.L.R.B. Case No. 12-CA-22114

Tab No: 102

EXHIBIT

F

FORM NLRB-760
(12-82)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

ADVANCED MASONRY ASSOCIATES, L.L.C. d/b/a ADVANCED MASONRY SYSTEMS

Employer

and

BRICKLAYERS AND ALLIED CRAFTWORKERS LOCAL 8 SOUTHEAST

Petitioner

Case: 12-RC-175179

Date Filed 4/29/16

Date Issued JUNE 9, 2016

Type of Election: *(Check one:)*
- ☒ Stipulation
- ☐ Board Direction
- ☐ Consent Agreement
- ☐ RD Direction

Incumbent Union *(Code)*

(If applicable check either or both:)
- ☐ 8 (b) (7)
- ☒ Mail Ballot

TALLY OF MAIL BALLOTS

The undersigned agent of the Regional Director certifies that the results of the tabulation of ballots cast in the election held in the above case, and concluded on the date indicated above, were as follows.

1. Approximate number of eligible voters.	110
2. Number of Void ballots	2
3. Number of Votes cast for PETITIONER.	16
~~4. Number of Votes cast for~~.	1
~~5. Number of Votes cast for~~ .	1
6. Number of Votes cast against participating labor organization(s).	16
7. Number of Valid votes counted (sum of 3, 4 ~~,5,~~ and 6)	32
8. Number of Challenged ballots	22
9. Number of Valid votes counted plus challenged ballots (sum of 7 and 8)	54

10. Challenges are ~~(not)~~ sufficient in number to affect the results of the election.

11. A majority of the valid votes counted plus challenged ballots (item 9) has (not) been cast for PETITIONER

For the Regional Director
Region 12

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For EMPLOYER
ADVANCED MASONRY ASSOCIATES, L.L.C. d/b/a ADVANCED MASONRY SYSTEMS

For

For PETITIONER
BRICKLAYERS AND ALLIED CRAFTWORKERS LOCAL 8 SOUTHEAST

For

* U.S.G.P.O.: 1994 – 384-162

CASE NO. 18-14163

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ADVANCED MASONRY ASSOCIATES, LLC
d/b/a Advanced Masonry Services

(Petitioner/Appellant)

vs.

NATIONAL LABOR RELATIONS BOARD

(Respondent/Appellee)

A Petition for Review of an Order of the National Labor Relations Board

N.L.R.B. Case No. 12-CA-22114

Tab No: 103

EXHIBIT

G

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION TWELVE

ADVANCED MASONRY ASSOCIATES, LLC. d/b/a ADVANCED MASONRY SYSTEMS,	*	
Employer,	*	
and,	*	**Case No. RC-12-175179**
BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 8-SOUTHEAST	*	
Petitioner.	*	

PETITIONER'S POST-ELECTION OBJECTIONS

Petitioner, BAC Local 8 Southeast [hereinafter "Petitioner" or "Union"], through undersigned counsel, and pursuant to Section 102.69(a) of the National Labor Relations Board's Rules and Regulations files the following Petitioner's Objections to the Conduct of the Election and to Conduct Affecting the Results of the Election in the above-styled matters. Petitioner requests that its seven (7) challenges to voters in the election on the basis of supervisory status be sustained; and, that the Board's and Employer's fifteen (15) collective challenges to voters in the election be overruled. Alternatively, if the Petitioner does not prevail in the election once the challenges are resolved, Petitioner requests that the election be set aside and a new election ordered as a result of the Employer's objectionable conduct affecting the results of the election.

Objections

1. Employer, by and through its agent(s), terminated an employee for his Union activities in violation of Section 8(a)(3). This termination of a union supporter, threatened, intimidated and coerced eligible voters rendering them unable to exercise free choice of a bargaining agent in the election.

Petitioner will submit supporting evidence for this objection separately within the time provided by the NLRB Rules and Regulations.

2. Employer, by and through its agent(s), threatened, coerced and intimidated employees by stricter enforcement of work rules rendering eligible voters unable to exercise their free choice of a bargaining unit agent in the election.

Petitioner will submit supporting evidence for this objection separately within the time provided by the NLRB Rules and Regulations.

3. Employer, by and through its agent(s), interrogated employees about their union activities and sentiments. This interrogation threatened, coerced and intimidated eligible voters rendering them unable to exercise their free choice of a bargaining unit agent in the election.

Petitioner will submit supporting evidence for this objection separately within the time provided by the NLRB Rules and Regulations.

4. Employer, by and through its agent(s) provided an *Excelsior* list that was inaccurate and incomplete, including but not limited to providing incorrect addresses for eligible voters and completely omitting eligible voters. Employer's failure to provide correct addresses both disenfranchised eligible voters and interfered with Petitioner's access to eligible voters during the campaign. The complete omission of eligible employees from the *Excelsior* list in

the context of a mail ballot election completely disenfranchised eligible voters and denied the Petitioner an opportunity to communicate with these eligible voters.

Petitioner will submit supporting evidence for this objection separately within the time provided by the NLRB Rules and Regulations.

5. Employer was permitted to include an additional employee on the *Excelsior* list after the time permitted for producing the *Excelsior* list. The inclusion of an employee combined with the omission of seven (7) other employees raises suspicion of the reliability of the *Excelsior* list. Irregularities in the *Excelsior* list in the context of a mail ballot election affects the result of the election and interferes with the requisite laboratory conditions required for elections.

Petitioner will submit supporting evidence for this objection separately within the time provided by the NLRB Rules and Regulations.

6. Employer, by and through its agent(s), offered free health insurance to an eligible voter. This action coerced eligible voters rendering them unable to exercise their free choice of a bargaining unit agent in the election.

Petitioner will submit supporting evidence for this objection separately within the time provided by the NLRB Rules and Regulations.

7. Employer violated Section 8(a)(5) by unilaterally changing the terms and conditions of employment during the term of a Section 8(f) collective bargaining agreement with Petitioner. This action undermined the Union's position as the bargaining representative of eligible voters. This conduct was intimidating and coercive and interfered with the laboratory conditions required for the election.

Petitioner will submit supporting evidence for this objection separately within the time provided by the NLRB Rules and Regulations.

8. Employer, by and through its representative, threatened employees that wages would decrease if the Union won the election. These statements threatened, coerced and intimidated employees rendering eligible voters unable to exercise their free choice of a bargaining unit agent in the election.

Petitioner will submit supporting evidence for this objection separately within the time provided by the NLRB Rules and Regulations.

9. Employer, by and through its representatives, discriminatorily applied its solicitation policy to Petitioner.

Petitioner will submit supporting evidence for this objection separately within the time provided by the NLRB Rules and Regulations.

10. Employer changed terms and conditions of employment during the election and while a question of representation existed by failing to make required contributions to affiliated fringe benefit plans before the expiration of the collective bargaining agreement. By these actions, Employer threatened, coerced and intimidated employees rendering eligible voters unable to exercise their free choice of a bargaining unit agent in the election.

By these and other acts and conduct, the employees were misled, interfered with, intimidated, restrained, confused and coerced, thus rendering them unable to exercise free choice of a bargaining agent in the election and destroying the laboratory conditions necessary to the holding of a free election.

Petitioner will submit supporting evidence for this objection separately within the time

provided by the NLRB Rules and Regulations.

WHEREFORE, if Petitioner does not prevail in the election after the challenges are resolved, the Petitioner requests that the election be set aside and a new election directed.

Respectfully submitted,

Kimberly C. Walker
14438 Scenic Highway 98
Fairhope, AL 36532
251-928-8461
kwalker@kcwlawfirm.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above foregoing Petitioner Post Election Objections has been filed electronically with the Regional Director on the date specified below:

National Labor Relations Board
Region 12
Attn: Margaret J. Diaz, Regional Director
South Trust Plaza
201 East Kennedy Blvd.
Suite 530
Tampa, FL 33602-5824

I further certify that pursuant to 29 C.F.R. §102.114(i), the expedited service rules have been complied with by service of the above and forgoing pleading to those below, via the specified method noted :

Charles Thomas, Esq.
Thompson, Sizemore, Gonzalez, & Hearing, P.A.
201 North Franklin Street, Suite 1600
Post Office Box 639 (33601)
Tampa, Florida 33602
(813) 273-0050
CThomas@tsghlaw.com

This 16th day of June, 2016

Kimberly C. Walker

CASE NO. 18-14163

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ADVANCED MASONRY ASSOCIATES, LLC
d/b/a Advanced Masonry Services

(Petitioner/Appellant)

vs.

NATIONAL LABOR RELATIONS BOARD

(Respondent/Appellee)

A Petition for Review of an Order of the National Labor Relations Board

N.L.R.B. Case No. 12-CA-22114

Tab No: 104

EXHIBIT

I

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

ADVANCED MASONRY ASSOCIATES, LLC d/b/a
ADVANCED MASONRY SYSTEMS

Employer

and Case 12-RC-175179

BRICKLAYERS AND ALLIED CRAFTWORKERS,
LOCAL 8 - SOUTHEAST

Petitioner

STIPULATION

It is hereby stipulated and agreed by and between Advanced Masonry Associates, LLC d/b/a Advanced Masonry Systems (the Employer) and Bricklayers and Allied Craftworkers Local 8 – Southeast (the Petitioner), regarding certain challenged ballots cast in the mail ballot election and counted on June 9, 2016, as follows:

1. The Employer agrees that it shall not contest the Petitioner's challenges to the ballots of Brian Canfield, Marc Carney, Robert Dutton, Coy Hale, Brent McNett, Mario Morales and Todd Wolosz, and agrees that the Region therefore may exclude these seven ballots from the tally of ballots as ineligible voters and their ballots will not be counted. The parties and the Region agree that the foregoing shall not be construed as an admission by the Employer that they are supervisors within the meaning of Section 2(11) of the National Labor Relations Act.

2. David Almond was not an eligible voter inasmuch as he was discharged for cause as of the time of the election and had no reasonable expectation of recall. The ballot of David Almond will not be counted.

It is further understood that this stipulation is final and binding upon the undersigned parties.

Upon approval of this Stipulation by the Regional Director, the Region will issue a revised Tally of Ballots in this matter.

ADVANCED MASONRY ASSOCIATES, LLC
d/b/a ADVANCED MASONRY SYSTEMS

By: _____
Signature *Date*

BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 8 - SOUTHEAST

By: Vicky C Wilson 11/8/2016
Signature *Date*

APPROVED:

Margaret J Diaz 11/17/2016
Regional Director *Date*

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

ADVANCED MASONRY ASSOCIATES, LLC d/b/a
ADVANCED MASONRY SYSTEMS

Employer

and Case 12-RC-175179

BRICKLAYERS AND ALLIED CRAFTWORKERS,
LOCAL 8 - SOUTHEAST

Petitioner

STIPULATION

It is hereby stipulated and agreed by and between Advanced Masonry Associates, LLC d/b/a Advanced Masonry Systems (the Employer) and Bricklayers and Allied Craftworkers Local 8 – Southeast (the Petitioner), regarding certain challenged ballots cast in the mail ballot election and counted on June 9, 2016, as follows:

1. The Employer agrees that it shall not contest the Petitioner's challenges to the ballots of Brian Canfield, Marc Carney, Robert Dutton, Coy Hale, Brent McNett, Mario Morales and Todd Wolosz, and agrees that the Region therefore may exclude these seven ballots from the tally of ballots as ineligible voters and their ballots will not be counted. The parties and the Region agree that the foregoing shall not be construed as an admission by the Employer that they are supervisors within the meaning of Section 2(11) of the National Labor Relations Act.

2. David Almond was not an eligible voter inasmuch as he was discharged for cause as of the time of the election and had no reasonable expectation of recall. The ballot of David Almond will not be counted.

It is further understood that this stipulation is final and binding upon the undersigned parties.

Upon approval of this Stipulation by the Regional Director, the Region will issue a revised Tally of Ballots in this matter.

ADVANCED MASONRY ASSOCIATES, LLC
d/b/a ADVANCED MASONRY SYSTEMS

By: _____ 11/8/16
Signature Date

BRICKLAYERS AND ALLIED CRAFTWORKERS, LOCAL 8 - SOUTHEAST

By: _____
Signature Date

APPROVED:

_____ 11/17/2016
Regional Director Date

CASE NO. 18-14163

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ADVANCED MASONRY ASSOCIATES, LLC
d/b/a Advanced Masonry Services

(Petitioner/Appellant)

vs.

NATIONAL LABOR RELATIONS BOARD

(Respondent/Appellee)

A Petition for Review of an Order of the National Labor Relations Board

N.L.R.B. Case No. 12-CA-22114

Tab No: 105

EXHIBIT

F

FORM NLRB-760
(12-82)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

ADVANCED MASONRY ASSOCIATES, L.L.C. d/b/a ADVANCED MASONRY SYSTEMS

Employer

and

BRICKLAYERS AND ALLIED CRAFTWORKERS LOCAL 8 SOUTHEAST

Petitioner

Case: 12-RC-175179

Date Filed 4/29/16

Date Issued JUNE 9, 2016

Type of Election: *(Check one:)*
- ☒ Stipulation
- ☐ Board Direction
- ☐ Consent Agreement
- ☐ RD Direction

Incumbent Union *(Code)*

(If applicable check either or both:)
- ☐ 8 (b) (7)
- ☒ Mail Ballot

TALLY OF MAIL BALLOTS

The undersigned agent of the Regional Director certifies that the results of the tabulation of ballots cast in the election held in the above case, and concluded on the date indicated above, were as follows.

1. Approximate number of eligible voters.	110
2. Number of Void ballots	2
3. Number of Votes cast for PETITIONER.	16
~~4. Number of Votes cast for~~.	1
~~5. Number of Votes cast for~~ .	1
6. Number of Votes cast against participating labor organization(s).	16
7. Number of Valid votes counted (sum of 3, 4 ~~,5,~~ and 6)	32
8. Number of Challenged ballots	22
9. Number of Valid votes counted plus challenged ballots (sum of 7 and 8)	54

10. Challenges are ~~(not)~~ sufficient in number to affect the results of the election.

11. A majority of the valid votes counted plus challenged ballots (item 9) has (not) been cast for PETITIONER

For the Regional Director
Region 12

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For EMPLOYER
ADVANCED MASONRY ASSOCIATES, L.L.C. d/b/a ADVANCED MASONRY SYSTEMS

For

For PETITIONER
BRICKLAYERS AND ALLIED CRAFTWORKERS LOCAL 8 SOUTHEAST

For

* U.S.G.P.O.: 1994 – 384-162

CASE NO. 18-14163

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ADVANCED MASONRY ASSOCIATES, LLC
d/b/a Advanced Masonry Services

(Petitioner/Appellant)

vs.

NATIONAL LABOR RELATIONS BOARD

(Respondent/Appellee)

A Petition for Review of an Order of the National Labor Relations Board

N.L.R.B. Case No. 12-CA-22114

Tab No: 106

EXHIBIT

L

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

ADVANCED MASONSRY ASSOCIATES, LLC
d/b/a ADVANCED MASONRY SYSTEMS

Employer

and Case 12-RC-175179

BRICKLAYERS AND ALLIED CRAFTWORKERS,
LOCAL 8 SOUTHEAST

Petitioner

ADVANCED MASONRY ASSOCIATES, LLC
d/b/a ADVANCED MASONRY SYSTEMS

and Case 12-CA-176715

BRICKLAYERS AND ALLIED CRAFTWORKERS,
LOCAL 8 SOUTHEAST

REGIONAL DIRECTOR'S REPORT ON OBJECTIONS AND CHALLENGED BALLOTS, ORDER DIRECTING HEARING AND CONSOLIDATING CASES AND NOTICE OF HEARING

The petition in this matter was filed on April 29, 2016, by Bricklayers and Allied Craftworkers, Local 8 Southeast (the Petitioner). Pursuant to a Stipulated Election Agreement, approved on May 6, 2016, an election was conducted via U.S. Mail to determine whether employees of Advanced Masonry Associates, LLC d/b/a Advanced Masonry Systems (the Employer) wish to be represented for purposes of collective bargaining by the Petitioner. The voting unit consists of:

> All bricklayers and/or masons employed by the Employer, excluding all other employees, office and clerical employees, professional employees, guards and supervisors as defined in the Act.

The tally of ballots prepared at the conclusion of the election, and issued on June 9, 2016, shows that of approximately 110 eligible voters, there were 2 void ballots, 16 votes were cast for the Petitioner, 16 votes were cast against the Petitioner, and there were 22 challenged ballots. Challenged ballots were sufficient in number to affect the results of the election.

Thereafter, on November 17, 2016, the undersigned Regional Director approved a Stipulation entered into by the Employer and the Petitioner that resolved 8 of the 22 determinative challenged ballots. As set forth in the Stipulation, the challenged ballots cast by David Almond, Brian Canfield, Marc Carney, Robert Dutton, Coy Hale, Brett McNett, Mario Morales and Todd Wolosz were sustained and those individuals were therefore ineligible to vote. Accordingly, a revised Tally of Ballots issued on November 17, 2016, showing that of approximately 110 eligible voters, there were 2 void ballots, 16 votes were cast for the Petitioner, 16 votes were cast against the Petitioner, and there were 14 challenged ballots. The revised Tally of Ballots is attached as Appendix 1. The remaining challenged ballots are sufficient in number to affect the results of the election.

On June 16, 2016, the Petitioner timely filed 10 Objections to conduct affecting the results of the election. A copy of the Objections was served on the Employer. Petitioner's Objections are attached hereto as Appendix 2.

Pursuant to Section 102.69 of the Board's Rules and Regulations, the undersigned caused a preliminary investigation to be made of the issues raised by the Petitioner's Objections and the determinative challenged ballots, during which all parties were afforded an opportunity to submit evidence and their respective positions on the issues involved. The investigation disclosed and the undersigned finds, recommends, and reports as follows:

Determinative Challenged Ballots

The Employer challenged the ballots cast by Luis A. Acevedo, Robert Harvey, Raymond Pearson, John Smith and Walter Stevenson on the basis that they were discharged for cause. The Employer challenged the ballots cast by Robert Baker, Jacob Barlow, Jeremy Clark, Mark France, Forest Greenlee, Dustin Hickey, Robert Pretsch, George Reed and David Wrench on the basis that they quit their jobs. The Board agent conducting the election challenged the ballots cast by Robert Harvey, Raymond Pearson, Robert Baker, Mark France, Robert Pretsch, George Reed, and David Wrench because they were not on the voter list provided by the Employer.

The challenged ballots cast by Luis A. Acevedo, Robert Harvey, Raymond Pearson, John Smith, Walter Stevenson, Robert Baker, Jacob Barlow, Jeremy Clark, Mark France, Forest Greenlee, Dustin Hickey, Robert Pretsch, George Reed, and David Wrench raise substantial and material issues of fact, which can best be resolved by a hearing.

Objection Numbers 1, 2, 3, 6, 8 and 9[1]

In Objection 1, the Petitioner contends that Employer terminated the employment of an employee for his union activities in violation of Section 8(a)(3) of the Act, and that this conduct threatened, intimidated and coerced eligible voters. In Objection 2, the Petitioner contends that the Employer threatened, coerced and intimidated employees by stricter enforcement of work rules. In Objection 3, the Petitioner contends that the Employer interrogated employees about their union activities and sentiments. In Objection 6, the Petitioner contends that the Employer offered free health insurance to an eligible voter. In Objection 8, the Petitioner contends that the Employer threatened employees that wages would decrease if the Union won the election. In Objection No. 9, the Petitioner contends that the Employer, by and through its representatives, discriminatorily applied its solicitation policy to Petitioner. The Petitioner contends that the aforementioned conduct of the Employer threatened, coerced and intimidated employees, rendering eligible voters unable to freely choose a bargaining agent in the election.

The Employer denies having engaged in the conduct alleged in Objections Nos. 1, 2, 3, 6, 8 and 9.

The Petitioner filed an unfair labor practice charge against the Employer in Case 12-CA-176715 on May 20, 2016. Thereafter the Petitioner filed first and second amended charges against the Employer in Case 12-CA-176715 on July 26, 2016, and August 29, 2016, respectively. The second amended charge alleges that the Employer violated Section 8(a)(1) and (3) of the Act. Following an investigation, on October 31, 2016, the undersigned issued a Complaint and Notice of Hearing Case 12-CA-176715 alleging, inter alia, that the Employer violated Section 8(a)(1) and (3) of the Act by the same or similar conduct as the conduct which is the subject of Objections 1, 2, 3, 6, 8 and 9.

I find that Objections 1, 2, 3, 6, 8, and 9 raise substantial and material issues of fact, which can be best resolved by a hearing.

Objections 4 and 5

In Objection 4, the Petitioner contends that the Employer provided an *Excelsior* list (voter list) that was inaccurate and incomplete because it contained incorrect addresses for eligible voters and completely omitted eligible voters. The Petitioner asserts that the Employer's failure to provide correct addresses both disenfranchised eligible voters in the mail ballot election, and interfered with the Petitioner's access to and ability to communicate with eligible voters. In Objection 5, the Petitioner contends that the Employer was permitted to include an additional employee on the *Excelsior* list (voter list) after the time permitted for producing the list, that this conduct further raises suspicion about the reliability of the list, and that irregularities in the list in the context of

[1] On October 5, 2016, the Petitioner withdrew Objection Numbers 7 and 10.

a mail ballot election affected the result of the election and interfered with the laboratory conditions required for elections.

The Employer denies having engaged in the conduct alleged in Objection Nos. 4 and 5.

I find that Objections 4 and 5 raise substantial and material issues of fact, which can be best resolved on the basis of record testimony, and a hearing is directed with regard to those objections.

ORDER

Having concluded that the evidence developed by the investigation of challenged ballots cast by Luis A. Acevedo, Robert Harvey, Raymond Pearson, John Smith, Walter Stevenson, Robert Baker, Jacob Barlow, Jeremy Clark, Mark France, Forest Greenlee, Dustin Hickey, Robert Pretsch, George Reed, and David Wrench, and Petitioner's Objections 1 through 6, 8 and 9 raise substantial and material issues of fact which can best be resolved by a hearing, **IT IS ORDERED** that a hearing be held for the purpose of receiving evidence to resolve the issues raised with respect to those challenged ballots and Objections.

IT IS FURTHER ORDERED, pursuant to Section 102.33 and 102.72 of the Board's Rules and Regulations of the National Labor Relations Board, Series 8, as amended, that Cases 12-RC-175179 and 12-CA-176715 are consolidated for the purposes of hearing, ruling, and decision by an Administrative Law Judge, and that thereafter Case 12-RC-175179 be transferred to and continued before the Board in Washington, D.C., and that the provisions of Section 102.46 and 102.69 of the above-mentioned Rules and Regulations shall govern the filing of exceptions.

YOU ARE NOTIFIED THAT on **February 6, 2017**, at **10:00 a.m.**, at the **National Labor Relations Board Hearing Room, 201 East Kennedy Blvd., Suite 530, Tampa, Florida**, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the Complaint in Case 12-CA-176715, and the aforementioned challenged ballots and Petitioner's Objections.

Dated: December 13, 2016

Margaret J. Diaz

Margaret J. Diaz, Regional Director
National Labor Relations Board, Region 12
201 East Kennedy Boulevard, Suite 530
Tampa, Florida 33602-5824

ATTACHMENTS

FORM NLRB-4168
(12-82)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

ADVANCED MASONRY ASSOCIATES, L.L.C.
d/b/a ADVANCED MASONRY SYSTEMS
Employer

and

BRICKLAYERS AND ALLIED
CRAFTWORKERS LOCAL 8 SOUTHEAST
Petitioner

Case 12-RC-175179 | Date Filed: 4/29/16

Date Issued **November 17, 2016**

Type of Election: ***(Check one:)***

- ☐ Consent Agreement
- ☒ Stipulation
- ☐ Board Direction
- ☐ RD Direction

Also check box below where appropriate:)

☐ 8 (b) (7)

REVISED TALLY OF BALLOTS
(READ)

The undersigned agent of the Regional Director certifies that the resolution of the challenged ballots in accordance with the Stipulation executed by the parties and approved by the Regional Director on November 17, 2016, is as follows:

		Original Tally	Challenged Ballots Counted	Final Tally
Approximate number of eligible voters	—	110		
Number of Void ballots		2		2
Number of Votes cast for	PETITIONER	16		16
~~Number of Votes cast for~~				
~~Number of Votes cast for~~				
Number of Votes cast against participating labor organization(s)	—	16		16
Number of Valid votes counted		32		32
Number of undetermined challenged ballots	—	22		14
Number of Valid votes counted plus challenged ballots		54		46
Number of Sustained challenges *(voters ineligible)*	8			

The remaining undetermined challenged ballots, if any, shown in the Final Tally column are ~~(not)~~ sufficient to affect the results of the election.

A majority of the valid votes plus challenged ballots as shown in the Final Tally column has (not) been cast for

For the Regional Director Region 12

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that this counting and tabulating, and the compilation of the Final Tally, were fairly and accurately done, and that the results were as indicated above. We also acknowledge service of this Tally.

For EMPLOYER
ADVANCED MASONRY ASSOCIATES, L.L.C. d/b/a ADVANCED MASONRY SYSTEMS

For

For PETITIONER
BRICKLAYERS AND ALLIED CRAFTWORKERS LOCAL 8 SOUTHEAST

For

* U.S.G.P.O.: 1985–0-488-357/49050

APPENDIX I

CASE NO. 18-14163

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ADVANCED MASONRY ASSOCIATES, LLC
d/b/a Advanced Masonry Services

(Petitioner/Appellant)

vs.

NATIONAL LABOR RELATIONS BOARD

(Respondent/Appellee)

A Petition for Review of an Order of the National Labor Relations Board

N.L.R.B. Case No. 12-CA-22114

Tab No: 107

EXHIBIT

O

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

ADVANCED MASONRY ASSOCIATES, LLC
d/b/a ADVANCED MASONRY SYSTEMS

and

Cases 12-RC-175179
12-CA-176715

BRICKLAYERS AND ALLIED CRAFTWORKERS,
LOCAL 8 SOUTHEAST

COUNSEL FOR THE GENERAL COUNSEL'S
BRIEF TO THE ADMINISTRATIVE LAW JUDGE

Table of Contents

Table of Authorities

CASES

TREATISES

I. Statement of the Case

This case involves Advanced Masonry Associates, LLC d/b/a Advanced Masonry Systems (the Respondent) efforts to undermine employee support for the Bricklayers and Allied Craftworkers, Local 8 Southeast (the Union) by unlawfully interrogating, threatening, and discharging employees following the filing of a representation petition by the Union. Over the course of the five day hearing conducted by Administrative Law Judge Michael A. Rosas in these consolidated cases, two competing narratives emerged to explain Respondent's conduct during the critical period of the union representation election held in May and of June 2016. This sole issue to be decided in this case is which narrative is supported by the weight of the credible evidence presented at the hearing: whether Respondent pivoted in its treatment of and attitude toward the Union when the petition was filed, taking swift and decisive action to ensure that the Union did not prevail in the election, or whether Respondent behaved, as it contends it did, as a model employer that would never deviate from either the letter or the spirit of the law – any law.

The evidence presented at the hearing demonstrates that shortly after the petition was filed in Case 12-RC-175179 on April 29, 2016, Respondent's admitted supervisors and agents, Brent "Turbo" McNett (McNett) and Aleksei "Alek" or "Alex" Feliz (Feliz) threatened to reduce employee wages if they voted for the Union, and that admitted supervisor Mario Morales (Morales) unlawfully interrogated employee Luis Acevedo (Acevedo) regarding his interactions with union organizer and former employee of Respondent, Michael Bontempo (Bontempo). Furthermore, Respondent suddenly decided to more strictly enforce its so called "zero tolerance" policy for fall protection violations against Acevedo, a Union member and a visible and vocal Union supporter, when he was found for the first time to arguably be in violation of

that policy. Walter Stevenson (Stevenson), who was working with Acevedo that day, was also discharged for purportedly violating the fall protection policy, also for the first time. Respondent discharged Acevedo because of his support for the Union, and it discharged Stevenson in an attempt to make it appear as if it were acting in a non-discriminatory manner. The credible evidence shows that not only were Acevedo and Stevenson never trained to tie off their fall protection to a scaffold by Respondent, that doing so is actually unsafe, and that furthermore, three other employees were merely temporarily suspended for fall protection violations prior to April 29, 2016. The credible evidence shows that only one other employee, Brandon Carollo (Carollo), was discharged for fall protection, and then only after his third violation within a year. In fact, Respondent reported to the Florida Department of Economic Opportunity's Reemployment Assistance Program[1] that its policy was to give warnings for first and second violations of the fall protection policy, and to discharge only after the third violation.

After discussing the facts in greater detail, this brief will examine why Acevedo and Stevenson were the more credible witnesses and highlight the glaring inconsistencies of the testimony given by Respondent's parade of managers. Following the credibility discussion, this brief will analyze the facially unlawful statements by Feliz, McNett, and Morales, as well as how the unlawfully strict enforcement of Respondent's "zero tolerance" fall protection policy, and the concurrent discharge of Acevedo and Stevenson, were motivated by Respondent's animus against the Union.

II. Statement of Facts

A. Background

Respondent, a Florida limited liability company, is a construction subcontractor performing masonry, bricklaying, and blocklaying work throughout the state of Florida. [GCX

[1] This program administers the State's unemployment compensation benefits.

1(r), para. 2(a); GCX 1(m), para. 2; Tr. 857].[2] Brothers Richard and Ron Karp are Respondent's principles and owners; their corporate headquarters is located in Sarasota, Florida. [GCX 1(r), para. 2(a); GCX 1(m), para. 2; Tr. 856, 880]. Ron Karp is primarily responsible for negotiating and finalizing Respondent's bids and contracts for work, and has very little involvement with the day-to-day operations of the company. [Tr. 857-859]. Richard Karp did not testify at the hearing, and his role in the operation is not clear. Marc Carney (Carney), the Chief of Operations, oversees the foremen on each job site and travels between the job sites, ensuring that all work is completed in accordance with contractual deadlines. [Tr. 812-813]. Respondent may be fined heavily by the general contractors for each day that work continues past the deadline. [Tr. 719, 889].

Foremen, in turn, oversee the crews performing the masonry work: masons, and the laborers/tenders who assist with scaffold-building, heavy lifting, and grout-mixing. [Tr. 33, 126, 166, 445, 611, 636, 1060]. Safety Director Aleksei Feliz (Feliz) and Safety Coordinator Fernando Ramirez (Ramirez) travel between sites, checking on safety conditions and equipment on site. [Tr. 25-26, 513]. Ramirez also conducts safety trainings at job sites, although the parties dispute how in depth those trainings were. [Tr. 513-514].

At the Sarasota headquarters, Respondent maintains physical personnel files for all its employees, and former employees' files are kept for at least some period of time. [e.g. GCX 4(b); Tr. 705-706, 896-897, 941-942]. The front of each file folder is preprinted with a personnel information form, including contact information and an employment history section, which indicates dates of hire and the name of the project/foreman the employee is working under at that

[2] The Regional Director issued an amendment to the Complaint, changing the location of the alleged threat by McNett, and interrogation by Morales, from the Westshore Yacht Club job site to the University of Tampa job site, on January 11, 2017. Counsel for the General Counsel further amended the Complaint by oral motion at the hearing, adding paragraph 6(b), and at the direction of ALJ Rosas, a Conformed Amended Complaint (GCX 1(r)) was added to the formal papers and admitted in evidence. Respondent's Answer (GCX 1(m)) denied all allegations.

time, and dates and reasons for separation as they occur, such as "LO" for "layoff" or "VQ" for "voluntarily quit." [GCX 4(b); Tr. 39-40, 942, 953]. Occasionally, on instruction from a supervisor or manager, the office staff will also write "Do Not Hire" or "DNH" on an employee's personnel file folder. [Tr. 958-959].

Because Respondent's work is project-based, the size of its workforce varies. [Tr. 860]. Thus, on a given job site, there is typically a period of time at the beginning and at the end when fewer employees are needed. [Tr. 239-240, 860]. Hourly employees are paid on a weekly basis. [Tr. 176]. Respondent and the Union were parties to a collective bargaining agreement formed pursuant to Section 8(f) of the Act (the 8(f) Agreement) covering Respondent's masons from at least May 1, 2004, and until at least April 30, 2016. [GCX 14; Tr. 167-171]. After Respondent informed the Union that it no longer intended to be party to the 8(f) Agreement, the Union filed the petition in Case 12-RC-175179 on April 29, 2016, seeking to become the elected 9(a) bargaining representative of Respondent's mason employees instead. [Tr. 174-175; RDX 1(a)].

B. Respondent's Job Sites

During the relevant time period, Respondent was performing masonry work at several job sites in central Florida: Bethune-Cookman University in Daytona Beach (the BCU job site); the Westshore Yacht Club in Tampa (the WYC job site); the University of Tampa in Tampa (the UT job site); the Hermitage in St. Petersburg (the Hermitage job site); and the Holiday Inn Express in St. Petersburg (the Hotel job site). [JS 4-6; Tr. 175, 214, 287, 725, 728].

At the BCU job site, Respondent's masons constructed four dormitories in two phases, from November 9, 2014, to June 19, 2016. [Tr. 651, 862]. Brent "Turbo" McNett (McNett) was the foreman of the BCU job site during phase II, which lasted from May 17, 2015, until April 24, 2016; foreman Bob Dutton had been in charge of phase I of the BCU job and continued in that capacity through phase II. [JS 7; Tr. 650-651, 895]. On April 17, 2016, McNett also became the

supervisor of the UT job site, which involved laying a brick veneer on both the exterior walls and on a series of interior columns for a new campus fitness center. [JS 8; Tr. 395-396, 617-618, 670]. McNett, who remained on the project until its completion on July 24, 2016, was assisted at the UT job site by foreman Mario Morales (Morales) until July 3, 2016. [JS 8-9].

Meanwhile, at the WYC job site, foreman Coy Hale (Hale) oversaw block-work on several condominium buildings that had been ongoing since July 27, 2014, taking over from previous foreman Todd Wolosz in February 2016. [JS 5; GCX 4(b); Tr. 131, 781]. Foreman Brian Canfield oversaw the two concurrent projects in St. Petersburg, the Hermitage and the Hotel job sites. [Tr. 725]. When Canfield was not present at the Hermitage site, while it was winding down, Respondent's employees were supervised by the assistant superintendent of the general contractor of the project. [Tr. 737-738]. All foremen are responsible for ensuring the quality of the workmanship and the timely completion of Respondent's portion of the work for the general contractor. [Tr. 611]. Since about 2013, foremen have been eligible for bonuses if they finished ahead of schedule. [Tr. 263-265, 366].

C. Acevedo's and Stevenson's Employment at the Westshore Yacht Club

i. Respondent Delays Acevedo's Union Dues Withholding

Luis Acevedo (Acevedo) was hired by Respondent as a mason on its WYC job site and commenced work on January 25, 2016.[3] [Tr. 392-393]. Walter Stevenson (Stevenson) was hired for the WYC job site around the same time. [Tr. 125]. Acevedo was paid $22 per hour, and frequently worked overtime. Because Acevedo was a Union member, on January 26, Bontempo visited the WYC job site so that Acevedo could complete a dues withholding authorization form. [GCX 13; Tr. 392, 397-399]. Bontempo faxed Acevedo's completed authorization form to Respondent that night. [GCX 13; Tr. 399].

[3] Hereinafter, all dates are 2016 unless otherwise noted.

Sometime after meeting with Bontempo, Acevedo noticed that his Union dues were not being withheld from his weekly paychecks, despite having completed the dues checkoff authorization form. [Tr. 399]. Acevedo first addressed the problem with foreman Hale, who said that he would call the office about it. However, withholdings still did not begin. [Tr. 399-400]. About four weeks after starting at the WYC, Acevedo spoke to Feliz during an on-site visit, asking him to please make sure that his dues came out of his paychecks. [Tr. 400]. Feliz said that he would, and about two or three weeks later, Acevedo's dues began to be withheld. [Tr. 400].[4]

ii. Safety Training

On February 9, Safety Coordinator Ramirez came to the WYC job site to present a safety orientation.[5] [Tr. 414,515]. Ramirez conducted the training "vaguely," without any scaffolding or "on the job training;" instead, it "was basically all verbal and show-and--tell" with various pieces of safety equipment. [Tr. 130-134, 415]. The training lasted no more than half an hour. [Tr. 131, 416].

Employees were instructed to drill a hole in the floor of the building and insert "the Miller tie," an anchor pin which would spring open, locking the anchor into the concrete. [Tr. 133-134, 415-416, 558; GCX 20]. They were to then attach one end of their retractor, a metal ratchet-device with two cables that lock in place if there is sudden force exerted on them, to the loop in the Miller tie, and attach the other end of the retractor to their body harness. [Tr. 133-134, 415-417; GCX 24].[6] If needed, employees could hook a wide, six-foot long nylon strap, to the Miller tie as an extension before attaching the retractor. [Tr. 133-134, 526]. Employees were

[4] The personnel file copy of the form, admitted into evidence as GCX 13, includes a notation dated March 30, 2016, and unknown initials "BK." March 30, 2016 was about eight weeks after Acevedo began working for Respondent.
[5] Although Stevenson first testified that he thought "a guy named Mario" and Alek Feliz conducted the training, he later recalled that it was "probably" Fernando Ramirez rather than Mario Morales. [Tr. 131, 160].
[6] Employees frequently refer to the retractor as a "yoyo," and did so throughout the hearing transcript interchangeably with the word "retractor." [e.g. Tr. 132].

also shown "a short lanyard with a big hook on it," and told not to hook the short strap and the long nylon strap together; only to hook the retractor to the long strap. [Tr. 133-134, 525-526].

If employees could not use the Miller tie in the floor, they were instructed instead to "find something above to hook to." [Tr. 133]. Employees were told not to hook the retractor directly to the scaffold, but were not otherwise instructed on how they could safely tie off to the scaffolding, as the Miller ties were being utilized on the WYC job site. [Tr. 132-136, 415-417, 462, 530]. Ramirez testified that "that's how I instruct my employees to connect their self. It's strictly a Miller anchor." Tr. [558-559]. Following the training, employees were required to sign off on their attendance. [GCX 2(c); RX 7; Tr. 151, 413-414].[7]

iii. Mason Tim Bryant Sent Home for Fall Protection Violation Instead of Being Discharged

Respondent asserted that it had "zero tolerance" for fall protection violations at the training. [Tr. 152, 518]. By the time the safety training was conducted, Acevedo and Stevenson had already started work at the WYC job site. [Tr. 130-131, 414]. Another employee that attended the training, Timothy Bryant (Bryant), had been working on the WYC site since November 16, 2015. [GCX 2(c), 4(b)]. Just a month after the training, on March 8, 2016, Safety Coordinator Ramirez observed Bryant "laying block on a leading edge," 18 feet off the ground, and was not connected to his anchor point. [GCX 4(a), 4(c); Tr. 546-547]. Acevedo and mason Flynn Gamble were also nearby and witnessed the violation; Acevedo said that Bryant was not wearing a harness at all. [GCX 4(a), 4(c); Tr. 433-434]. Ramirez surreptitiously said to Acevedo in Spanish, "Don't say nothing. I want to send that guy home." [Tr. 434]. Ramirez then snuck up to where Bryant was working and said, "Hey, you come down, you go home for today." [Tr. 434]. Ramirez filled out a form for Bryant to sign, which he did, and went home.

[7] RX 7 includes more signature pages than GCX 2(c) as well as a cover page for GCX 2(a), which had not been produced to the General Counsel prior to the date of the hearing.

[GCX 4(a); Tr. 434]. Acevedo saw Bryant return to the job site two days later, during the same work week. [Tr. 434, 495, 500].

Although Bryant's form had the "Dismissal" box marked, Ramirez admitted that he "made a mistake" and was supposed to check "Suspension." [Tr. 547-548]. Ramirez testified, "I didn't terminate [Bryant], I sent him home." [Tr. 548]. Ramirez emailed Feliz about the incident that same day. [GCX 4(c)]. Bryant's employment did not end until April 19, 2016, when WYC job site foreman Coy Hale discharged him for insubordination. [GCX 4(b); TR. 788-89]. In fact, Respondent apparently did not even consider the violation serious enough to inform Hale of the issue, as Hale testified that he was unaware of the fall protection violation at the time he discharged Bryant. [Tr. 787-89].

D. Representation Election Campaign

Following the filing of the representation petition, Respondent created numerous pieces of campaign literature, nearly all of which accuse the Union of taking employees' money in some form or fashion. [GCX 7(a) through 7(g), 7(i) through 7(m)]. Many fliers note that "Florida is a right-to-work state," a term commonly misunderstood to mean "non-union." [GCX 7(a) through 7(g), 7(i), and 7(l)]. They also say "KEEP UNIONS OUT OF AMS" or "KEEP YOUR AMS FAMILY NON-UNION," and tell employees and former employees to "vote union no," against the Union. [GCX 7(a) through 7(g), 7(i) through 7(m)].

Some fliers were mailed to employees' homes, and some were given to employees with their paychecks. [Tr. 128, 691-692]. Some implied that the Union lies to the employees. [GCX 7(b), 7(c)]. Many insinuate that the Union steals from employees. [GCX 7(c), 7(d), 7(g), 7(i) through 7(m)]. One sent to the homes of former employees informed them that:

> […] During the time you worked here, the Union collected **$2.85** for every hour you worked **EVEN IF YOU WERE NOT A UNION MEMBER.** Based on the

> total hours you worked, that means the Union collected approximately $_[amount inserted for each former employee]_ for your labor.
>
> It is time to stop the Union from collecting money based on the labor of those who get no benefit from them whatsoever.

[GCX 7(l); emphasis original]. Another flyer sent to former employees' homes accused the Union of corruption and included a list of the salaries of its 136 staffers, a total of $12.4 million. The flyer then said:

> The Union is of no benefit to you. In fact, within the last six months, AMS lost a $6 million masonry contract to a non-union bidder. The dollar difference in the bids was approximately the amount of money AMS would have had to pay the Union.
>
> **WAKE UP!!** Recognize the enemy! The enemy is anyone who wants to take money from you so they can spend it on themselves. **The enemy is the Union!**
>
> # VOTE NO!

[GCX 7(m); emphasis original].

E. Acevedo and Stevenson are Transferred to the University of Tampa Job Site

Around mid-April, when Respondent commenced brickwork at the UT job site, Acevedo and Stevenson were transferred there from the WYC job site. [Tr. 125, 395]. Employees initially worked on the outside of the fitness building for about two weeks, laying a brick veneer over the new 40 to 50 foot high wall. [Tr. 126, 143, 395, 618]. Employees were not required to wear harnesses or otherwise utilize personal fall protection. [Tr. 149-150, 419]. The scaffoldings they stood on could crank to higher and higher elevations as they worked their way up the wall, and had metal railings on the other three faces. [Tr. 149-150, 418-419, 519-520]. No Activity Hazard Analysis ("AHA") was given to McNett for the job, and no safety orientation was conducted for the employees at the UT job site. [Tr. 136, 417, 701].

i. Morales' Unlawful Interrogation Regarding Employees' Interactions with Union Representative Bontempo

During the week of April 18 through 23, shortly after the UT job commenced, Bontempo came to the UT job site at about 3:30 p.m. to check on the employees. [Tr. 402-404; RX 58]. He spoke to Acevedo, who told him that they were working overtime that day and asked Bontempo to come back around 5:00 p.m. [Tr. 403]. Acevedo said that since it was hot out and they had no water, to bring them something to drink. [Tr. 403].

Bontempo returned at 5:00 p.m. with Gatorade and Union t-shirts to distribute to any employees – masons or not – who wanted them. [Tr. 402-403; GCX 12, RX 58]. Acevedo took two of the shirts;. [Tr. 402-403]. Stevenson did not take one, because Bontempo did not have his size. [Tr. 145]. During the visit, Acevedo signed some papers Bontempo brought for him regarding the Union insurance plan. [Tr. 403; RX 58]. Bontempo also had union membership applications for the masons, and Acevedo helped explain the benefits of joining the Union to non-member masons during the visit. [Tr. 404-405].

The next morning, before employees had even started working, foreman Morales approached Acevedo in the parking lot and asked him what papers he had signed for the Union. [Tr. 406-407]. Acevedo said that he didn't sign anything, because he was already a member of the Union. [Tr. 407].

Acevedo began wearing his two Union shirts to work. [Tr. 405]. The first week after being given the shirts, he wore a Union shirt three or four times, and the second week, he wore it two or three times. [Tr. 405]. Other employees who took shirts from Bontempo wore them to work, but some only wore it once. [Tr. 406]. Acevedo wore it more than any other employees. [Tr. 406].

ii. McNett's Unlawful Threat that Wages Would Go Down if the Union Wins the Election

Every Monday morning on the UT job site, the general contractor would hold a safety meeting for the employees of all of the job's subcontractors' employees. [Tr. 412-413, 700]. Following that meeting, foreman McNett would hold a weekly "Toolbox Talk," a five to fifteen minute-long safety briefing distributed by Feliz and the Safety Department, in front of Respondent's job site Conex, for Respondent's employees.[8] [Tr. 79, 129-130, 412-413, 612]. During the Toolbox Talk on either May 2, May 9, or May 16, McNett mentioned the Union campaign that was underway.[9] [Tr. 129, 648]. He said that he "couldn't say a whole lot" about it, but McNett nonetheless told employees his "theory on mason wages," and that it probably "won't be good for wages" if the Union won. [Tr. 129, 648]. Toolbox Talks were mandatory for all AMS employees, and they were required to sign the week's sheet from the Safety Department before they could begin work for the day. [Tr. 129-130, 414; RX 14].

Throughout their time on the job site, McNett would also badmouth the Union, repeatedly asserting that the Union stole money from the masons, money that they deserved. [Tr. 407-408, 854]. These statements, made two or three times a week, echoed the anti-Union literature disseminated by Respondent at that time. [Tr. 408; GCX 7(c), 7(d), 7(g), 7(i) through 7(k)].

iii. Feliz's Unlawful Threat that Wages Will Go Down if the Union Wins the Election

Sometime during the week of May 2, after the masons had been on the site for about two or three weeks, some moved inside the fitness center to add yet more brick veneer to columns on

[8] The Conex is a secure trailer for Respondents' employees to store supplies in when they leave the job site. [Tr. 129].

[9] May 2, May 9, and May 16, 2016, were the only Mondays occurring after the representation petition was filed on April 29 and before Acevedo and Stevenson were suspended at lunchtime on May 16.

both the first and second floors while the others finished the exterior. [Tr. 127, 396, 620]. The columns jutted out sixteen inches from a glass wall and each measured four feet across, creating three faces on which the masons would lay brick. [Tr. 396, 499, 619]. The masons worked in teams of two, and each team took about two days to complete a column. [Tr. 127, 396, 670-671]. In total, there were eight to ten columns to build on each story. [Tr. 670]. Rather than using the exterior scaffolding that had a crank to elevate the work platform, the masons used "double scaffolding," two six-foot sections stacked atop one another, so that the masons' feet were about six or seven feet off the ground, standing on the floor planks laid on the second tier. [Tr. 138, 149, 419-420, 491-492]. The double scaffold also had wheels on it, presumably to make it easier to move from column to column every other day. [Tr. 492]. As on the exterior of the building, the employees were not required to wear harnesses or otherwise anchor to fall protection while working side-by-side on the floor-to-ceiling columns for the first two weeks. [Tr. 137-139, 149, 154, 159, 396, 621, 670-671].

During one of Safety Director Feliz's visits to the UT job site in May 2016, Feliz gathered the Spanish-speaking masons together inside of the building during lunch time to talk to them about the upcoming election. [Tr. 410, 846]. In addition to Acevedo, the other masons present were Lucio Guerra, Carlos Martin, Gerardo Luna, Alfredo (last name unknown), and three brothers, Salvador, Armando, and Ramon Camacho. [Tr. 105-106, 410, 846-847]. Feliz told the masons that there was going to be an election, and explained "the reasons why [Respondent] did not want to continue with the Union." [Tr. 410-411, 847]. Feliz told them that he wanted them to "vote for no, no union, because the Union is taking our money." [Tr. 410-411]. Feliz went on to tell the masons that if they "vote yes for union, [their] rate is going to go down." [Tr. 411]. Feliz said their wages would go down to $18 and change per hour. [Tr. 411].

Acevedo spoke up and told Feliz and the other masons present that that was not true. [Tr. 412]. Feliz did not respond verbally, but glared at Acevedo "like he was mad." [Tr. 412]. No other employees said anything or asked any questions. [Tr. 412, 849-850]. Feliz concluded, "Just don't vote for the Union." [Tr. 411].

iv. Acevedo and Stevenson are Suspended for a Fall Protection Violation

On Monday morning, May 16, foreman McNett's Toolbox Talk was on the topic of safety when using rigging and lifts to move loads around the job site. At the conclusion of the talk, McNett also told the employees that from then on, they had to be tied off. [Tr. 137-138, 148, 153, 621]. Stevenson told McNett that he had to go to his truck and get his harness, and McNett said, "Fine, go get your harness." [Tr. 158-159]. Meanwhile, foreman Morales approached Acevedo before they started work and asked him if he had a harness, because they did not have enough for everybody. [Tr. 420]. Acevedo said that he had his personal harness in his car, and went to the parking lot to retrieve it. [Tr. 421]. Neither McNett nor Morales gave the masons any instruction as to how employees should tie off under the specific working conditions. [Tr. 140-141, 422, 621].

Acevedo and Stevenson returned to the second floor of the fitness center and proceeded to tie off to the scaffold that they were working on that day. Acevedo hooked his six-foot strap to the back of the scaffold, and connected his harness to it with the retractor, attached his retractor to the scaffold's back cross bars, then hooked the six-foot strap to the retractor, and, finally, attached the strap to the back of his harness. [Tr. 422, 625-626]. Stevenson may not have been using his strap at all, and directly looped his retractor to the scaffolding using its hook and cord. [Tr. 139, 158, 424, 626-627].

About an hour later, McNett returned to the second floor through a stairwell that opened most closely to the column where Acevedo and Stevenson were working. [Tr. 423, 625]. He

immediately started screaming, more to Acevedo than to Stevenson, "What are you doing?" [Tr. 423-424]. As McNett got closer, he said, "What did you do? You're not supposed to tie this [meaning the harness] like that." [Tr. 423].

McNett asked Acevedo if he had received safety harness orientation. [Tr. 424]. Acevedo replied "No," because Respondent had never trained him on how to tie off while working on a scaffold. [Tr. 424, 629]. McNett unhooked the strap and retractor from Acevedo's harness, then wrapped the strap around and around the scaffolding, forming a sort of "cinnamon roll" with the six feet of material. [Tr. 139-140, 423, 628-629]. McNett then reattached the retractor to the strap and to Acevedo's back, and repeated the procedure for Stevenson. [Tr. 139-140, 424, 628]. Acevedo told McNett that it was against OSHA regulations to tie off to the scaffold. [Tr. 423-424, 628]. McNett did not reply, and instead walked away. [Tr. 423-424].

At lunch time, McNett and Ramirez, who had come to the site a little after 12:00 p.m., found Acevedo on his break. [Tr. 426, 632]. McNett began screaming that Acevedo had lied to him about getting safety orientation. [Tr. 426]. Acevedo replied that he had got a safety orientation, but not to tie off behind him, and that "by law, nobody's supposed to tie it up to the scaffold." [Tr. 426]. Acevedo continued, saying that no one had been using a harness, even outside, working at the height they had been, risking their lives, and now he was being required to wear it working at only seven feet high. [Tr. 426-427]. McNett told Acevedo that they were not supposed to use the harness when working facing towards the wall. [Tr. 427].

Stevenson came by during this conversation and McNett told him to come over. [Tr. 427]. McNett and Ramirez told Acevedo and Stevenson to sign the warnings Ramirez had filled out, because they were being sent home for the day for tying off incorrectly. [GCX 5, 6; Tr. 139, 426, 539-540, 633]. Referencing the "cinnamon bun" method McNett had done with their straps,

Stevenson asked, "Why weren't we told that before we got up there? You just said tie off." [Tr. 140-141]. McNett replied, "It's not in my hands. I was told to send you home, and you're in review." [Tr. 141]. Both men signed the papers, which was their first and only warning for fall protection violations – and, in fact, their first discipline of any kind while working for Respondent – and went home. [GCX 5, 6; Tr. 139, 141-142, 427, 429].

v. Feliz Discusses Acevedo with Senior Managers and Decides to Discharge Acevedo and Stevenson

At some point later that same day, Ramirez brought Feliz documentation showing that Acevedo and Stevenson were the two employees who had been suspended for the fall protection violation. [Tr. 90-91, 541]. Aware that Acevedo was a Union member, Feliz decided to discuss the discipline with company principles Ron and Richard Karp. [Tr. 91-92]. They determined that they were going to discharge Acevedo. [Tr. 92-94, 847]. Feliz communicated that decision to McNett. [Tr. 633-634].

vi. McNett Discharges Acevedo and Stevenson

Acevedo arrived at the UT job site early the next morning, Tuesday, May 17. [Tr. 141, 428]. He was about to sign in for the day when McNett, who was standing there, along with Morales and a laborer, said that he was letting Acevedo go. Acevedo said, "I don't get it, what's that mean?" [Tr. 428]. McNett said it was because he had violated safety regulations.

Acevedo said, as he had done the day before, that "nobody's supposed to tie up to the scaffold by OSHA regulations." [Tr. 428-429]. McNett replied that Acevedo was lying to him. Acevedo said, "I don't get it. Why do you let me go? I don't get it, that part. So I'm laid off?" [Tr. 429]. McNett said, "No, you're fired," raising his voice, as he had done the day before. [Tr. 429]. Acevedo said, "So, you fire me because I'm a Union guy?" [Tr. 429, 634]. McNett replied, "This is America; fight for your rights." [Tr. 429].

Acevedo then returned to the parking lot, where he made two calls before driving home. First, he called Stevenson, and told him not to come in, because McNett had just sent him home. [Tr. 141, 430]. Acevedo then called Feliz, and explained what had happened. [Tr. 94, 430]. Feliz said, "Luis, that's the way it is, there's nothing that we can do. I'm sorry, that's what it is." [Tr. 430].

Stevenson still proceeded to go to the job site to speak to McNett personally. [Tr. 141]. McNett said, "You're terminated for not tying off properly," and, "It came from above, it's not me." [Tr. 141].

F. Other Fall Protection Violations on Respondent's Job Sites

Besides Bryant, Acevedo, and Stevenson, the record reflects three other employees who had fall protection violations in the year preceding Acevedo's and Stevenson's discharge. Brandon Carollo (Carollo), a mason tender (laborer), was discharged on February 10, 2016, after his third fall protection violation. [GCX 8(a) through 8(e)]. His Reason for Leaving Form states merely that Bob Dutton "[f]ired" him. [GCX 8(a)]. However, McNett testified that he discharged Carollo. [Tr. 638-639]. More specifically, McNett testified that he observed Carollo working without a safety harness and that when he spoke to Carollo about it, Carollo said "f" you. [Tr. 638-639]. Although McNett's testimony implies that he discharged Carollo for violating the fall protection rule, he did not state the actual reason for the decision to discharge Carollo. [Tr. 638-640]. Furthermore, the only document that indicates that Carollo was discharged for a safety violation is the Florida Department of Economic Opportunity Claimant Information document completed by Respondent's Human Resources Administrator and Benefits Coordinator, Yolanda Phelps (Phelps).[10] [GCX 8(b); Tr. 51]. That document states that

[10] Feliz testified that he also prepared papers for the Florida Department of Economic Opportunity (DEO) in response to Carollo's unemployment claim. [Tr. 48-50; GCX 8(c)]. Phelps' typed copy appears virtually identical

Carollo was discharged following the "3rd violation of an OSHA safety rule." [GCX 8(b)]. Likewise, the document also states that "the consequences of violating the rule or policy" are "first and second warnings, third discharge." [GCX 8(b)].

Carollo's first warning, on June 24, 2015, resulted in a two-day suspension. Carollo was observed by a supervisor of contractor Hensel Phelps at the BCU job site, "working on Building 2, 3rd floor on the outside wall east side… exposed to fall without wearing his PPE (fall protection) when he was working on top of the non-stop scaffold." [GCX 8(d)]. Safety Coordinator Ramirez completed the incident report on a Hensel Phelps form. [GCX 8(d); Tr. 542-543, 571-572]. Less than three months later, on August 10, 2015, Carollo was again warned and suspended for three days after he was observed by Hensel Phelps walking on the scaffold after untying his safety harness "to step across… to another run of scaffold." [GCX 8(e); Tr. 899]. Foreman Dutton filled out and signed the Hensel Phelps incident form on that occasion. [GCX 8(e)].

McNett also discharged scaffold builder/laborer Timothy Golphin (Golphin) from the BCU job site on February 10. [RX 33; Tr. 636-637]. McNett heard from another AMS employee, Ernest Jasper, that Golphin had been talking on his cell phone, and was not tied off at an elevation of 38 or 40 feet. [Tr. 637]. McNett did not personally witness Golphin's behavior. [Tr. 637]. Golphin's Reason for Leaving Form was not signed by any supervisor, and states that Dutton was his foreman. [RX 33]. The form gives equal weight to Golphin's failure to tie off and his use of his cell phone while working. [RX 33].

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in content to Feliz's handwritten responses to the DEO's questions, so it is immaterial that it is unknown which was ultimately submitted to the DEO. However, it is reasonable to infer that the typed copy would have been submitted, as there would be no other reason for Phelps, with no personal knowledge of the situation, and Respondent's main payroll administrator, to have completed a DEO form except for submission.

On February 19, 2016, nine days after Carollo and Golphin were discharged, either McNett or Dutton noted in his foreman's "Daily Log" that mason Richard Haser was working above six feet at the BCU job site and was not tied off, as observed by Hensel Phelps. [GCX 3]. The log also notes that it was Haser's second offense. [GCX 3]. "He was sent home," and was not permitted back on the site until completing Hensel Phelps' orientation, presumably for the second time. [GCX 3; Tr. 389-390].

Finally, Respondent also presented evidence of another employee, Jaswin Leonardo, who was discharged on May 26, 2016, ten days after Acevedo and Stevenson were suspended and ultimately discharged. [RX 34]. Ramirez wrote on the Warning Notice that he observed Leonardo, an employee at the "Midrise" project, "not using" fall protection at an elevation of about ten feet, and improperly dismounting the scaffold by stepping on the cross-braces instead of using a ladder. [RX 34].[11] Respondent also apparently introduced a new "Employee Termination Report" to replace the "Reason for Leaving Form" sometime in those ten days. [RX 34]. The Termination Report states that Leonardo "broke fall protection safety rule" and says "see attached," in reference to Ramirez's more detailed report on the Warning Notice. [RX 34]. Leonardo's Termination Report was not signed. [RX 34].

III. Argument

As an initial matter, the witness testimony offered by Acevedo and Stevenson was forthright, consistent, and logical. On the other hand, Respondent's witnesses presented at the hearing failed to present a consistent, coherent version of the events of May 16. Although they all toed the party line with respect to the overarching narrative – two masons broke a "zero tolerance" safety rule and were therefore discharged – the details of that event and the decision-

[11] According to the documentation, the foreman of the Midrise project was someone named "Miguel." No other evidence, testimonial or otherwise, was introduced regarding that job site.

making process vary widely and, at key moments, lacked specificity, deeply undermining Respondent's theory of the case. Though Respondent's witnesses paid lip service to the "zero tolerance" policy with respect to fall protection violations, the credible evidence shows that no employees were discharged for failing to tie off "properly," as Acevedo and Stevenson were, prior to the filing of the Union's representation petition. In fact, just one month after being trained on how to use fall protection for the WYC job, employee Tim Bryant was merely suspended for the day, rather than discharged, though he had failed to use any fall protection at all working at an elevation of about 18 feet above the ground. Furthermore, due to the lack of credibility of Respondent's witnesses, their testimony regarding the independent 8(a)(1) violations should also be discounted in favor of the more credible testimony of Acevedo and Stevenson.

A. Respondent's Supervisors, Managers, and Agents Presented Conflicting, Contradictory Testimony that Should Not Be Credited

In making credibility determinations, administrative law judges may rely on a number of factors, including "the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole." *Hills & Dales General Hospital*, 360 NLRB No. 70, slip op. at 7 (2014). The Board has cited with approval administrative law judge's discrediting of current employees who testify on behalf of the employer, reasonably inferring that the employee may be reluctant "to incur the Respondent's disfavor." *Classic Sofa, Inc.*, 346 NLRB 219, 220 at n. 2 (2006).

A trier of fact may also draw the "strongest possible adverse inference" against a party that fails to present a material witness presumed to be favorable to it, sometimes called the "missing witness rule." *Flexsteel Industries, Inc.*, 316 NLRB 745 (1995); *Douglas Aircraft*

Company, 308 NLRB No. 179, 179 fn. 1 (1992); *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977). This is particularly true where the "missing" witness is the respondent's agent, "within its authority or control. It is usually fair to assume that the party failed to call such a witness because it believed the witness would have testified adversely to the party." *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006), citing *Automated Business Machines*, 285 NLRB 1122, 1123 (1987).

i. Alexsei Feliz

Respondent's key witness with respect to the discharges of Acevedo and Stevenson, Safety Director Alexei Feliz, presented testimony that was not only internally inconsistent, but also frequently contradicted by Respondent's other witnesses, leaving the impression that he would say whatever he felt sounded most helpful to the case from moment to moment. His testimony with respect to the enforcement of Respondent's safety policies and the discharges of Acevedo and Stevenson should therefore be wholly discredited, as should his testimony with respect to the anti-Union speech he made to the Spanish-speaking masons at the UT job site.

One of the first things that Feliz testified about was that he "knew there was [a union] election going on," but that he "had nothing to do with it." [Tr. 44]. He later expanded upon that, saying:

> …I knew that there was a situation going on with the Union, which to be honest I'm not privileged to those details. It doesn't entail my department, but I knew that there was some situation going on with the Union and a vote was going to be made…

[Tr. 91]. This, Feliz says, is the reason he had to call the "senior management" to discuss discharging Acevedo on May 16, though he was also adamant that he did not need "permission" to discharge employees, because "[t]hat comes with the position. That's what I do." [Tr. 119]. Yet sometime in the two weeks before that date, Feliz had made a speech to the Spanish-

speaking masons about that election, and testified, "That's really when my involvement in this thing, this situation began." [Tr. 92]. Respondent's witness, current employee Gerardo Luna (Luna), testified that this speech lasted 20 to 30 minutes, indicating far more knowledge about the Union and the election process than Feliz was willing to admit he possessed at the hearing. [Tr. 849]. Due to Luna's status as an employee, his "corroboration" of Feliz's testimony that he made no threats to employees' wages during the speech should be discredited. *Classic Sofa, Inc.*, supra.

Feliz claims to have translated information about the election to the employees on behalf of Richard Karp, including questions from the employees directed to Richard Karp and Karp's responses. [Tr. 92-93, 103-104]. Yet Acevedo stated unequivocally that Feliz was alone when he spoke to them at the UT job site, and Luna testified that Feliz was giving the talk to the masons, without any indication that he was translating for someone else. [Tr. 411, 845-850]. Feliz also insisted that employees asked questions about wages and insurance, not that he was speaking spontaneously about it. [Tr. 104-107]. Acevedo testified that after he challenged Feliz's statement about wages going down if the Union won the election, Feliz looked like he was mad, and no one asked any questions. [Tr. 411-412]. Luna testified that he did not "remember if anybody formulated a question," and that Feliz "mentioned some things about wages." [Tr. 847, 849-850]. Additionally, it is notable that Respondent failed to present Richard Karp as a witness to testify about the statements, despite his presence at all five days of the hearing. Respondent's failure to call Richard Karp to testify should permit an adverse inference against Respondent with respect to the credibility of Feliz's testimony about this mandatory meeting held during the employees' lunch break. *Roosevelt Memorial Medical Center*, supra; *Flexsteel Industries, Inc.*, supra.

Feliz's testimony regarding the events of May 16 also does not comport with that given by other supervisors and agents of Respondent. Feliz testified that he first heard about the situation at the UT job site from Ramirez, who called him after receiving a call from McNett stating "that two employees were found in a fall protection violation, not using the equipment properly." [Tr. 89]. However, McNett testified that he called Feliz first, not Ramirez, and Ramirez testified that he was not notified until about 11:00 a.m., when Feliz called him. [Tr. 535, 570, 631].

Feliz also testified that he did not know which employees were tied off improperly until late in the day, when Ramirez brought him the "book" with the signatures from the WYC job site training. [Tr. 42-43, 89-91]. Ramirez, on the other hand, recalls being asked by Feliz on their initial call whether the employees had received training, and, when he asked Feliz for the employees' names so he could check, Feliz provided them. [Tr. 536].

With respect to his conversation with "senior management" about the discharges, Feliz stated that he discussed the discharges with "senior management." Yet, when he testified about his conversation with "senior management" that testimony describes only what was said to him by Richard Karp, and identifies no other participants:

> A: Correct. My report to senior management, especially to Mr. Karp, Richard Karp, was that I had documentation that two employees had been trained and provided the fall protection equipment that they needed to do their jobs, they were found not using that equipment properly or not tie off in a manner that they've been trained, and in light of that I was going to terminate those two employees, but ***I wanted to make sure that's the decision he wanted me to make*** considering what was going on.
>
> Q: And we know that apparently it was confirmed that you should make that decision because we wouldn't be here maybe today, because they were terminated, right?
>
> A: Yeah, correct. I mean I think Mr. Karp put it the best way. He's like our policy is the same policy for everyone regardless of what's going on. He's telling me, ***he told me*** if you feel confident that you've been -- that those

> two employees were properly trained, then ***I trust you, you make that decision,*** and yes, move forward with that decision.

[Tr. 93-94] (emphasis added). This version completely omits Ron Karp, who claims to have also been in on the decision-making process (though his recollection of the details also left much to be desired, as will be discussed in further detail below). [Tr. 873-874]. As noted above, an adverse inference should be drawn against Respondent for failing to present Richard Karp to testify about the contents of this critical decision. *Roosevelt Memorial Medical Center*, supra; *Flexsteel Industries, Inc.*, supra.

Feliz was similarly controverted with respect to Bryant's layoff. Although Feliz claimed that he thought Bryant had already been discharged for his fall protection violation, Bryant remained employed until April 19. [GCX 4(b)]. Ramirez knew that he had only suspended Bryant; Ramirez knew that he had emailed Feliz about the violation; Ramirez knew that he had received no response from Feliz with regard to what action to take. Ramirez did not follow up with Feliz, and both Ramirez and Feliz continued to visit the job site every week or two to check the safety conditions. HR Administrator Phelps recalled that she wrote "do not hire per Alek" on Bryant's personnel file because "he had some fall protection issues and that he was – had an attitude and that he did not want him back." [Tr. 959]. The WYC job site foreman, Hale, meanwhile, remembers discharging Bryant for insubordination, cursing Hale out in response to an instruction; Hale testified that he instructed the office to mark Bryant as ineligible for rehire. [Tr. 789].

Feliz would not say anything that he felt might hurt Respondent or paint him in a bad light, even when it had little or nothing to do with the case. For instance, although the documentation regarding the discharge of employee Robert Harvey (Harvey) says to see the attached time sheet and that Harvey was "causing problems at the hotel," Feliz maintained

several times that the only "problem" at the hotel was that Harvey was "not reporting for work." [RX 29; Tr. 913-914, 926].

> Q: What problems was Mr. Harvey causing at the hotel?
>
> A: He was not reporting to work.
>
> Q: That's it?
>
> A: Yeah. He's causing problems because I'm paying for a hotel room for an employee that is not reporting to work. So to me, that's a problem at the hotel.

[Tr. 926]. However, when HR Administrator Phelps testified, she said that she only writes down on the Reason for Leaving Form what the supervisor reporting the termination says to her, and that if the foreman writes "Fired" on the time sheet, as they frequently do, she will put "see attached time sheet" on the Reason for Leaving Form. [Tr. 944, 971-972]. With respect to Harvey, Phelps testified that Feliz told her that he was "causing issues at the hotel." [Tr. 944]. She could not recall, 16 months after the fact, what the specific "issues" were, but she said, "I remember that the hotel was upset and had let him [Feliz] know, and I just wrote it down." [Tr. 944]. Phelps also contradicted Feliz's testimony that he had "helped produce many of the records" in response to subpoenas issued by the General Counsel and by the Petitioner; she testified that no one else helped her with responding to the subpoenas, that she "compiled that information all alone." [Tr. 916, 976-979].

ii. Ron Karp

Ron Karp's testimony regarding the discharges of Acevedo and Stevenson gave only the broad strokes of the conversation. Karp was incapable of recalling specific details of who said what, when the call took place, or even whether there was one call or two and whether it was Feliz or Ramirez whom he and his brother spoke to about the discharges. [Tr. 879-881]. Yet Karp recalled with remarkable clarity that "we discussed it amongst ourselves and made the

decision that our safety policies and programs work, and they only work because we enforce them, and that we were going to stick with what was working and support the termination." [Tr. 874]. Karp was unable to say precisely what his individual input was. [Tr. 874].

Additionally, Karp testified that he signed in place of the foremen on the Reason for Leaving Forms of George Reed and Mark France, although he does "not often" sign such forms and was not familiar with the people or facts reflected on the form – in keeping with his minimal involvement in day-to-day operations – and, furthermore, could not recall who asked him to sign them. [Tr. 875-876]. Karp then testified that his reason for signing them was "to keep the files consistent" so there would not be an unsigned document produced in response to the trial subpoenas, which had been done just weeks before the hearing opened. [Tr. 891]. Nonetheless, Brandon Carollo's and Timothy Golphin's Reason for Leaving Forms, and Jaswin Leonardo's Employee Termination Report, were not signed by any foreman or manager. [GCX 8(a)].

iii. Fernando Ramirez

Ramirez's testimony that he presented Acevedo and Stevenson with their signatures in the orientation/training book "in a nice way" is directly contradicted by Acevedo's testimony that Ramirez did not speak to him at all prior to presenting him with the discipline form to sign. [Tr. 426, 536]. Ramirez also testified that there were only five or six masons present for the February 9 training, when the records reflect that in fact sixteen or seventeen masons were there that day. [Tr. 516, 556; RX 7]. Ramirez admitted that he didn't remember exactly how many were present that day, because "it happened a while ago." [Tr. 603]. Ramirez also recalled that the training took place in a "parking lot," while Stevenson said that it had happened "in a field by the Conex" and Acevedo said that it happened "on the ground." [Tr. 131, 416, 515].

Furthermore, while Ramirez testified that his safety training presentation typically lasts about one hour and fifteen minutes, both Acevedo and Stevenson stated that it took no more than

half an hour. [Tr. 131, 415, 515]. Ramirez himself acknowledged that many of the masons who come work for Respondent are experienced masons who have "been on construction jobs a long time," and Respondent's witnesses emphasized over and over the importance of speed to Respondent's masonry work. [Tr. 565, 614, 719, 784, 805, 889]. Delays are expensive; anything that distracts the masons from laying block or brick is frowned upon. [Tr. 614, 719, 784, 805, 889]. Under these circumstances, it is reasonable to assume that Ramirez would truncate the safety presentation to only the essential equipment required for the particular job. At the WYC job site, this would have meant training on the Miller ties, which both Acevedo and Stevenson remember, while omitting all but a "don't" instruction for tying off to scaffolding. [Tr. 133-136].

Finally, Ramirez testified that, "every time I do an inspection and I found any problems or issues about anything, I report back to [Feliz by email]." [Tr. 572]. However, Ramirez could not remember whether he sent an email about Acevedo and Stevenson to Feliz, compelling further inferences that their discharges were handled outside the norm of Respondent's policies. [Tr. 572].

iv. Mario Morales and Brent McNett

Morales and McNett testified that they both recall that Morales notified McNett about seeing Acevedo and Stevenson working without harnesses by calling him on the phone. [Tr. 624, 766]. However, McNett testified that, in response to being so informed, he told Morales to "tell them it's a good thing I didn't catch them," and instructed Morales to "make sure they [got] tied off properly." [Tr. 624]. According to McNett, Morales replied that he was going to have them get tied off. [Tr. 624]. Morales, on the other hand, testified that he told McNett he had already told them to go get their harnesses, and that they were already on their way back from the parking lot; McNett said, "Okay, I'll take care of it." [Tr. 766].

Morales later testified that he actually was not "a hundred percent" sure whether he had spoken to McNett in person or on the phone, although in July of 2016, shortly after the events in question, he recalled in his affidavit that he had done so in person, in front of the Conex. [Tr. 766-768]. Morales also volunteered that his "memory ain't all that great." [Tr. 769]. Morales was certain that he had talked to McNett, however, and that McNett had said he would "take care of it." [Tr. 766, 768].

Although Morales testified that he did not ask Acevedo any questions about his interaction with Bontempo at the UT job site, Morales stated that he had left the work site at 3:30 to get home on the day about which he was questioned. [Tr. 760]. Morales testified that he had received a call from Bontempo "after quitting time" and was already in the car, and that this was after the Notice of Election was posted on the job site. [Tr. 761]. However, Acevedo stated that on the day Bontempo came, they worked overtime, and Bontempo's records indicate that the visit occurred no later than April 23. [Tr. 403, RX 58]. Bontempo visited the UT job site several times while Acevedo was still employed, so Morales was apparently remembering a different visit than the pre-petition visit about which Acevedo had testified. His denial of the interrogation, specifically limited to the post-election visit he recounted, is therefore meaningless.

On the other hand, McNett testified that he tells employees that "AMS gets paid to lay the block/brick one time. If we have to go back and fix it, they do not get paid again." [Tr. 614]. Acevedo testified that he has heard McNett say "all the time" to motivate the workers that if "anybody make[s] a mistake, they going to – you going to repair on your own time with no pay." [Tr. 418]. Although counsel asked McNett to clarify who "they" was in the sentence, and McNett claimed that it was AMS, not the employees, there is no evidence that, even if he

phrased it the way he testified to, that the employees ever received that clarification or understood there to be a distinction. [Tr. 614-615]. McNett did not seem overly concerned with ensuring that workers got paid for their time; he testified that he tells employees they will not be paid for Mondays unless they sign in on the Toolbox Talk sheet. [Tr. 612].

On the whole, Respondent's witnesses presented self-serving and, at times thoroughly incredible testimony. To the extent their versions of events conflict with the documentary evidence and the more consistent testimony of Acevedo and Stevenson, their testimony should be discredited and disregarded, and all else should be taken with a healthy spoonful of salt.

B. Respondent's Supervisors Violated Section 8(a)(1) Prior to the Election with Interrogation and Threats

"It is well-established Board law that 'an employer violates Section 8(a)(1) of the Act if its conduct may reasonably be said to have a tendency to interfere with the free exercise of employee rights.'" *Corporate Interiors, Inc.*, 340 NLRB 732, 732 (2003), quoting *Frontier Hotel & Casino*, 323 NLRB 815, 816 (1997); *see also American Freightways Co*., 124 NLRB 146, 147 (1959). An employer's threat to cut employees' wages constitutes a per se violation of the Act; the Board has a long history of finding a violation where the employer's threat is implied through a statement that one of the consequences of unionization could be a wage reduction. *UNF West, Inc.*, 363 NLRB No. 96, slip op. at 4 (2016), citing *President Riverboat Casinos of Missouri, Inc.*, 329 NLRB 77, 77 (1999).

The intent or motive of the employer is not relevant to this analysis, and "does not turn on whether the coercion succeeded or failed." *American Freightways Co*., 124 NLRB at 147 (1959); *see also EF International Language Schools, Inc.*, 363 NLRB No. 20, slip op. at 11 (2015); *Corporate Interiors, Inc.*, 340 NLRB at 732; *Frontier Hotel & Casino*, 323 NLRB at 816. The standard of inquiry is an objective one, examining the effect of the employer's actions

on a reasonable employee. *Rocky Mountain Eye Center, P.C.*, 363 NLRB No. 34, slip op. at 7 (2015); *EF International Language Schools, Inc.*, supra; *Miller Electric Pump*, 334 NLRB 824, 825 (2001).

In determining whether questioning of an employee about that employee's protected, concerted activity violates the Act, the Board considers whether, under all the circumstances, the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise rights guaranteed by the Act. *United Services Automobile Assn.*, 340 NLRB 784, 786 (2003); *Rossmore House*, 269 NLRB 1176 (1984), *affd. sub nom. Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Among the factors that may be considered in this analysis are the identity of the questioner, the place and method of the interrogation, the background of the questioning, and the nature of the information sought. *Stevens Creek Chrysler Jeep Dodge*, 353 NLRB 1294, 1295 (2009), *enfd. sub nom. Mathew Enterprise, Inc. v. NLRB*, 771 F.3d 812 (D.C. Cir. 2014).

i. Morales Interrogated Acevedo about his Interaction with Bontempo

In this case, Morales, an admitted statutory supervisor, witnessed Acevedo doing something with some papers with Union agent Bontempo sometime between April 18 and April 23, and, first thing the next morning, as soon as he saw Acevedo, asked him what he was doing with Bontempo. [Tr. 406-407]. Although Morales denied asking Acevedo about his interaction with Bontempo, for the reasons discussed above, that denial is not credible. The interaction occurred within the first week that Acevedo was at the UT job, and may have been among his first interactions with a new foreman, as Morales had not worked at the WYC job.

Under these circumstances, a reasonable employee would have felt intimidated by the questioning about their interaction with the Union representative. Morales' questioning therefore

was unlawful, and Respondent should accordingly be found to have violated the Act as alleged in paragraph 5 of the Complaint.

ii. Feliz and McNett Threatened That Employees' Wages Would Go Down if the Union Won the Election

Acevedo testified that Feliz, an admitted statutory supervisor, told a group of seven or eight Spanish-speaking masons that they should vote against the Union, because the Union was taking their money. [Tr. 409-411]. Feliz went on to say that if they "vote yes for union," their rate would go down to $18-something per hour. [Tr. 411]. Luna, who testified at the behest of his employer, admitted that Feliz told the masons "the reasons why the Company did not want us to be with them...." [Tr. 848]. As discussed above, Feliz's testimony was not credible, and his denial of the threat should not be credited; Luna's assertion that Feliz never threatened the gathered employees or told them how to vote is undermined by his status as a current employee, and should also be discredited. Although Acevedo could not recall the specific amount that Feliz said their rate would be reduced to, he knew it was "18 and change." [Tr. 411]. Feliz's statement to employees that their wage rates would be reduced to $18 and change if the employees chose to be represented by the Union violated Section 8(a)(1) of the Act, as alleged in paragraph 6(a) of the Complaint.

Another statutory supervisor, McNett, admitted at the hearing that he told employees his "theory on mason wages" at his Toolbox Talk on May 16, which all of Respondent's employees at the UT job site were required to attend. [Tr. 648]. Stevenson's testimony elucidated the actual theory: that it "probably won't be good for wages" if the Union were to come back in. [Tr. 129, 146]. Although Acevedo did not testify that he heard McNett say that specifically, he testified that he heard McNett say "twice a week, three times a week" that the Union would steal the money that masons deserve. [Tr. 408]. Respondent's campaign literature played up this

theme heavily, emphasizing the amount of money that Respondent had to pay to the Union to satisfy its contractual obligations, and implying that this money could go into mason's pockets instead if Respondent were freed from those obligations. [GCX 7(c), (d), (g), (i) through (m)]. McNett's statement that selecting the Union "probably would not be good for wages" sent a clear message to employees that Respondent would reduce wages if the employees selected the Union, and the statement therefore violated Section 8(a)(1) of the Act.

C. Respondent Unlawfully Began to Strictly Enforce its "Zero Tolerance" Fall Protection Policy Only After the Union Filed its Representation Petition, and Violated the Act by Discharging Acevedo and Stevenson

In order to establish unlawful discrimination under Section 8(a)(3) and (1) of the National Labor Relations Act, the General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in protected activity, that the employer had knowledge of that activity, and that the employer's hostility to that activity "contributed to" its decision to take an adverse action against the employee. *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994), *clarifying NLRB v. Transportation Management*, 462 U.S. 393, 395, 403 n.7 (1983); *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd. on other grounds* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).[12]

Evidence that may establish a discriminatory motive – i.e., that the employer's hostility to protected activity "contributed to" its decision to take adverse action against the employee –

[12] The *Wright Line* standard upheld in *Transportation Management* and clarified in *Greenwich Colleries* proceeds in a different manner than the "prima facie case" standard utilized in other statutory contexts. See *Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133, 142-143 (2000) (applying Title VII framework to ADEA case). In those other contexts, "prima facie case" refers to the initial burden of production (not persuasion) within a framework of shifting evidentiary burdens. In the NLRA context, by contrast, the General Counsel proves a violation at the outset by making a persuasive showing that the employer's hostility toward protected activities was a motivating factor in the employee's discipline. At that point, the burden of persuasion shifts to the employer to prove its affirmative defense. Because *Wright Line* allocates the burden of proving a violation and proving a defense in this distinct manner, references to the General Counsel's "prima facie case" or "initial burden" are not quite accurate, and can lead to confusion, as General Counsel's proof of a violation is complete at the point where the General Counsel establishes by a preponderance of the evidence that employer's hostility toward protected activities was a motivating factor in the discipline.

includes: (1) statements of animus directed to the employee or about the employee's protected activities (*see, e.g.*, *Austal USA, LLC*, 356 NLRB No. 65, slip op. at p. 1 (2010) (unlawful motivation found where HR director directly interrogated and threatened union activist, and supervisors told activist that management was "after her" because of her union activities)); (2) statements by the employer that are specific as to the consequences of protected activities and are consistent with the actions taken against the employee (*see, e.g.*, *Wells Fargo Armored Services Corp.*, 322 NLRB 616, 616 (1996) (unlawful motivation found where employer unlawfully threatened to discharge employees who were still out in support of a strike, and then disciplined an employee who remained out on strike following the threat)); (3) close timing between discovery of the employee's protected activities and the discipline (*see, e.g.*, *Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000) (immediately after employer learned that union had obtained a majority of authorization cards from employees, it fired an employee who had signed a card)); (4) the existence of other unfair labor practices that demonstrate that the employer's animus has led to unlawful actions (*see, e.g.*, *Mid-Mountain Foods*, 332 NLRB 251, 251 n.2, passim (2000), *enfd. mem*. 11 Fed. Appx. 372 (4th Cir. 2001) (relying on prior Board decision regarding respondent and, with regard to some of the alleged discriminatees, relying on threatening conduct directed at the other alleged discriminatees)); or (5) evidence that the employer's asserted reason for the employee's discipline was pretextual, e.g., disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct, or providing a non-discriminatory explanation that defies logic or is clearly baseless (*see, e.g.*, *Lucky Cab Company*, 360 NLRB No. 43 (2014); *ManorCare Health Services – Easton,* 356 NLRB No. 39, slip op. at p. 3 (2010); *Greco & Haines, Inc.,* 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088, n.12, citing

Shattuck Denn Mining Co. v. NLRB, 362 F.2d 466, 470 (9th Cir. 1966); *Cincinnati Truck Center*, 315 NLRB 554, 556-557 (1994), *enfd. sub nom. NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997)).

Once the General Counsel has established that the employee's protected activity was a motivating factor in the employer's decision, the employer can nevertheless defeat a finding of a violation by establishing, as an affirmative defense, that it would have taken the same adverse action even in the absence of the protected activity. See *NLRB v. Transportation Management*, 462 U.S. at 401 ("the Board's construction of the statute permits an employer to avoid being adjudged a violator by showing what his actions would have been regardless of his forbidden motivation"). The employer has the burden of establishing that affirmative defense. *Id*.

The General Counsel has established a prima facie case. It is undisputed that Acevedo was a known Union member. [Tr. 60, 391-392]. Furthermore, Acevedo wore Union shirts to the UT job site two or three times a week, helped Bontempo sign up other employees for the Union, and told Feliz that his threat to the mason's wages was not true only days before his discharge. [Tr.404-405, 411-412]. Respondent therefore not only had knowledge of Acevedo's union support, that support became more visible to Respondent's foremen and Safety Director Feliz just as Respondent was ramping up its Union avoidance campaign. Stevenson, Acevedo's partner on May 16, was collateral damage in Respondent's attack on one of the Union's most ardent and open supporters.

Not only did Respondent have knowledge of Acevedo's union activity, it harbored animus toward that activity. Respondent's vigorous anti-union campaign demonstrates that it harbors general animus toward the Union. [GCX 7(a) through (g) and (i) through (m); Tr. 847]. Animus is further established by Respondent's interrogation of Acevedo about his union activity

and its threats to reduce employee wage rates should they select the Union as their collective bargaining representative. [Tr. 129, 406-407, 410-411, 847]. Respondent's animus is most notably demonstrated by its disparate treatment of Acevedo and Stevenson following the filing of the Union's representation petition, by more strictly enforcing its "zero tolerance" policy against them.

Despite Respondent's *maintenance* of a "zero tolerance" policy with respect to fall protection, the documents in the trial record belie the actual enforcement of that policy prior to May 16, 2016. Though Respondent's Safety Department claims to have saturated its employees and supervisors with safety policies and training materials trumpeting the "zero tolerance" policy, the evidence presented at the hearing shows unequivocally that no other employees were discharged for not being tied off "properly" as a first offense before – or after – Acevedo and Stevenson. In fact, as discussed above, the documents prepared by Respondent in response to Carollo's unemployment compensation claim demonstrate that Respondent's policy was to issue warnings to employees for their first two safety violations and only discharge after the third safety violation. [GCX 8(b)].

Respondent will likely assert that it has met its *Wright Line* burden and established that it would have discharged Acevedo and Stevenson even in the absence of Union activity. However, the evidence establishes that Respondent seized on the fall protection violation as a pretext to justify the discharge of Acevedo; Stevenson was discharged because he was assigned to work with Acevedo that day.

Prior to May 16, Respondent's fall protection policies were not being enforced at the asserted level of "zero tolerance." As discussed above, Carollo's fall protection violations were twice reported to Respondent, but he was not discharged until his third offense: failing even to

put his harness on while working at elevation. [GCX 8(a) through 8(e)]. The decision to discharge Carollo following his third safety violation is consistent with Respondent's safety policy as reported to the Florida Department of Economic Opportunity Reemployment Assistance Program. [GCX 8(b)]. Similarly, Haser's second fall protection violation was recorded in the BCU job site foreman's log book; Haser was merely sent home until he attended Hensel Phelps' orientation again. [GCX 3].

Though Respondent claims that Carollo and Haser's violations observed by Hensel Phelps did not result in discharge precisely because they were not personally observed by a member of Respondent's management, Bryant, who was spotted without a harness by Ramirez himself, was also only sent home for the day, not discharged. [GCX 4(a), 4(b); Tr. 81, 548]. Although Respondent attempted to paint Bryant's continued employment as the result of a miscommunication between Ramirez and Feliz, both safety officials could easily have found out whether Bryant continued to perform work for Respondent following the incident. Had Bryant's violation been treated like Acevedo and Stevenson's, Ramirez would have personally presented Feliz with the record of Bryant's training – merely a month prior – and Feliz would have clearly communicated to Ramirez or to foreman Hale that Bryant should be discharged. That did not occur because, in fact, Respondent was not enforcing "zero tolerance" at that time, and was only discharging employees following their third safety violation.

Respondent's other purported comparators, Golphin and Leonardo, were both guilty of severe compound violations, failing to anchor their harnesses at all while simultaneously engaging in another safety violation, and therefore do not establish that Respondent treated Acevedo and Stevenson in a similar manner. [RX 33, 34]. Golphin's discharge, resulting from his violation having been observed, not by foreman McNett, but a coworker, Ernest Jasper,

further undermines Respondent's contention that "zero tolerance" means that employees are only discharged if the violation is personally observed by a member of Respondent's management or its safety department. [Tr. 81]. Meanwhile, Leonardo, whose discharge occurred after May 16, does little to disprove the allegation that Respondent began more stringent enforcement of the zero tolerance policy after the Union filed its representation petition, in order to discourage employees from their Union support and other Union activities.

This overwhelming evidence of disparate treatment, combined with the timing of the suspensions cum discharges shortly after Acevedo spoke out against that campaign – directly to decision-maker Aleksei Feliz – during the peak of Respondent's Union avoidance campaign clearly demonstrates a causal nexus between Respondent's anti-Union animus and the decision to more strictly enforce the "zero tolerance" fall protection policy and discharge Acevedo and Stevenson. *Lucky Cab Company*, supra. For all the noise Respondent's witnesses made at trail about "zero tolerance," the fact of the matter is that "zero tolerance" was not enforced until Acevedo was the one violating the rule. Respondent has not, and cannot, carry its burden under *Wright Line* to prove that it would have discharged Acevedo and Stevenson regardless of the ongoing Union campaign.

Both discharges, occurring as the result of an abruptly more strict and disparate enforcement of the fall protection policy, therefore violate the Act in all respects alleged in paragraph 7 of the Complaint.

D. Due to the Severity and Nature of Respondent's Violations, Any Consequential Economic Harm Suffered by Acevedo and Stevenson Should be Included in the ALJ's Recommended Remedial Order

Under the Board's present remedial approach, some economic harms that flow from a respondent's unfair labor practices are not adequately remedied. *See* Catherine H. Helm, *The Practicality of Increasing the Use of Section 10(j) Injunctions*, 7 Indus. Rel. L. J. 599, 603 (1985)

(traditional backpay remedy fails to address all economic losses, such as foreclosure in the event of an inability to make mortgage payments). The Board's standard, broadly-worded make-whole order, considered independent of its context, could be read to include consequential economic harm. However, in practice, consequential economic harm is often not included in traditional make-whole orders. *E.g.*, *Graves Trucking*, 246 NLRB 344, 345 n. 8 (1979), *enfd. as modified*, 692 F.2d 470 (7th Cir. 1982); *Operating Engineers Local 513 (Long Const. Co.)*, 145 NLRB 554 (1963). The Board should issue a specific make-whole remedial order in this case, and all others, to require the Respondent to compensate employees for all consequential economic harms that they sustain, prior to full compliance, as a result of the Respondent's unfair labor practices.

Reimbursement for consequential economic harm, in addition to backpay, is well within the Board's remedial power. The Board has "'broad discretionary' authority under Section 10(c) to fashion appropriate remedies that will best effectuate the policies of the Act." *Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 2 (2014) (citing *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969)). The basic purpose and primary focus of the Board's remedial structure is to "make whole" employees who are the victims of discrimination for exercising their Section 7 rights. *See*, *e.g.*, *Radio Officers' Union of Commercial Telegraphers Union v. NLRB*, 347 U.S. 17, 54-55 (1954). In other words, a Board order should be calculated to restore "the situation, as nearly as possible, to that which would have occurred but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *see also J.H. Rutter-Rex Mfg.*, 396 U.S. at 263 (recognizing the Act's "general purpose of making the employees whole, and [] restoring the economic status quo that would have been obtained but for the company's" unlawful act).

Moreover, the Supreme Court has emphasized that the Board's remedial power is not limited to backpay and reinstatement. *Virginia Elc. & Power Co. v. NLRB*, 319 U.S. 533, 539 (1943); *Phelps Dodge Corp.*, 313 U.S. at 188-89. Indeed, the Court has stated that, in crafting its remedies, the Board must "draw on enlightenment gained from experience." *NLRB v. Seven-Up Bottling of Miami, Inc.*, 344 U.S. 344, 346 (1953). Consistent with that mandate, the Board has continually updated its remedies in order to make victims of unfair labor practices more truly whole. *See*, *e.g.*, *Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 4, 5 (revising remedial policy to require respondents to reimburse discriminatees for excess income tax liability incurred due to receiving a lump sum backpay award, and to report backpay allocations to the appropriate calendar quarters for Social Security purposes); *Kentucky River Medical Center*, 356 NLRB 6, 8-9 (2010) (changing from a policy of computing simple interest on backpay awards to a policy of computing daily compound interest on such awards to effectuate the Act's make whole remedial objective); *Isis Plumbing & Heating Corp.*, 138 NLRB 716, 717 (1962) (adopting policy of computing simple interet on backpay awards), *enf. denied on other grounds*, 322 F.2d 913 (9th Cir. 1963); *F.W. Woolworth Co.*, 90 NLRB 289, 292-293 (1950) (updating remedial policy to compute backpay on a quarterly basis to make the remedies of backpay and reinstatement complement each other); *see also NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 347 (1938) (recognizing that "the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress"). Compensation for employees' consequential economic harm would further the Board's charge to "adapt [its] remedies to the needs of particular situations so that the 'victims of discrimination' may be treated fairly," provided the remedy is not purely punitive. *Carpenters Local 60 v. NLRB*, 361 U.S. 651, 655 (1961) (quoting *Phelps Dodge*, 313 U.S. at 194); *see Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 11 (2014). The Board

should not require the victims of unfair labor practices to bear the consequential costs imposed on them by a respondent's unlawful conduct.

Reimbursement for consequential economic harm achieves the Act's remedial purpose of restoring the economic status quo that would have obtained but for a respondent's unlawful act. *J.H. Rutter-Rex Mfg.*, 396 U.S. at 263. Thus, if an employee suffers an economic loss as a result of the unlawful elimination or reduction of pay or benefits, the employee will not be made whole unless and until the respondent compensates the employee for those consequential economic losses, in addition to backpay. For example, if an employee is unlawfully terminated and is unable to pay her mortgage or car payment as a result, that employee should be compensated for the economic consequences that flow from the inability to make the payment: late fees, foreclosure expenses, repossession costs, moving costs, legal fees, and any costs associated with obtaining a new house or car for the employee.[13]

Similarly, employees who lose employer-furnished health insurance coverage as the result of an unfair labor practice should be compensated for the penalties charged to the uninsured under the Affordable Care Act and the cost of restoring the old policy or purchasing a new policy providing comparable coverage, in addition to any medical costs incurred due to loss of medical insurance coverage that have been routinely awarded by the Board. *See Roman Iron Works*, 292 NLRB 1292, 1294 (1989) (discriminatee entitled to reimbursement for out-of-pocket medical expenses incurred during the backpay period as it is customary to include reimbursement of substitute health insurance premiums and out-of-pocket medical expenses in make-whole remedies for fringe benefits lost).[14]

[13] However, an employee would *not* be entitled to a monetary award that would cover the mortgage or car payment itself; those expenses would have existed in the absence of any employer unlawful conduct.

[14] Economic harm also encompasses "costs" such as losing a security clearance, certification, or professional license, affecting an employee's ability to obtain or retain employment. Compensation for such costs may include payment

Modifying the Board's make-whole orders to include reimbursement for consequential economic harm incurred as a result of unfair labor practices is fully consistent with the Board's established remedial objective of returning the parties to the lawful status quo ante. Indeed, the Board has long recognized that unfair labor practice victims should be made whole for economic losses in a variety of circumstances. *See Greater Oklahoma Packing Co. v. NLRB*, 790 F.3d 816, 825 (8th Cir. 2015) (upholding award of excess income tax penalty announced in *Tortillas Don Chavas* as part of Board's "broad discretion"); *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955) (unlawfully discharged discriminatees entitled to expenses incurred in searching for new work), *enfd.*, 228 F.2d 871 (6th Cir. 1955); *BRC Injected Rubber Products*, 311 NLRB 66, 66 n.3 (1993) (discriminatee entitled to expenses for clothes ruined because she was unlawfully assigned more onerous work of cleaning dirty rubber press pits); *Nortech Waste*, 336 NLRB 554, 554 n.2 (2001) (discriminatee was entitled to consequential medical expenses attributable to respondent's unlawful conduct of assigning more onerous work that respondent knew would aggravate her carpal tunnel syndrome; Board left to compliance the question of whether the discriminatee incurred medical expenses and, if she did, whether they should be reimbursed); *Pacific Beach Hotel*, 361 NLRB No. 65, slip op. at 11 (2014) (Board considered an award of front pay but refrained from ordering it because the parties had not sought this remedy, the calculations would cause further delay, and the reinstated employee would be represented by a union that had just successfully negotiated a CBA with the employer). In all of these circumstances, the employee would not have incurred the consequential financial loss absent the respondent's original unlawful conduct; therefore, compensation for these costs, in addition to backpay, was necessary to make the employee whole.

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or other affirmative relief, such as an order to request reinstatement of the security clearance, certification, or license.

The Board's existing remedial orders do not ensure the reimbursement of these kinds of expenses, particularly where they did not occur by the time the complaint was filed or by the time the case reached the Board. Therefore, the Board should modify its standard make-whole order language to specifically encompass consequential economic harm in all cases where it may be necessary to make discriminatees whole.

The Board's ability to order compensation for consequential economic harm resulting from unfair labor practices is not unlimited, and the Board concededly "acts in a public capacity to give effect to the declared public policy of the Act," not to adjudicate discriminatees' private rights. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. at 193. Thus, it would not be appropriate to order payment of speculative, non-pecuniary damages such as emotional distress or pain and suffering.[15] In *Nortech Waste*, supra, the Board distinguished its previous reluctance to award medical expenses in *Service Employees Local 87 (Pacific Telephone)*, 279 NLRB 168 (1986) and *Operating Engineers Local 513 (Long Construction)*, 145 NLRB 554 (1963), as cases involving "pain and suffering" damages that were inherently "speculative" and "nonspecific." *Nortech Waste*, 336 NLRB at 554 n.2. The Board explained that the special expertise of state courts in ascertaining speculative tort damages made state courts a better forum for pursuing such damages. *Id.* However, where – as in *Nortech Waste* – there are consequential economic harms resulting from an unfair labor practice, such expenses are properly included in a make-whole remedy. *Id.* (citing *Pilliod of Mississippi, Inc.*, 275 NLRB 799, 799 n.3 (1985) (respondent liable for discriminatee's consequential medical expenses); *Lee Brass Co.*, 316 NLRB 1122, 1122 n.4 (1995) (same), enforced mem., 105 F.3d 671 (11th Cir. 1996)).[16]

[15] This is in contrast to non-speculative consequential economic harm, which will require specific, concrete evidence of financial costs associated with the unfair labor practice in order to calculate and fashion an appropriate remedy.

[16] The Board should reject any argument that ordering reimbursement of consequential economic harms is akin to the compensatory tort-based remedy added to the make-whole scheme of Title VII by the Civil Rights Act of 1991.

Respondent unlawfully discharged Acevedo and Stevenson on May 16, 2016, nearly a year before the hearing in this case. Certainly a year will have passed before any Board order issues. It is irrelevant that the record contains no evidence of Acevedo's or Stevenson's interim employment, as the Board leaves the determination of the amount of backpay and consequential economic harm to the compliance phase. *Nortech Waste*, supra. At this stage, it is sufficient that such consequential economic harm, if it exists, are appropriate and remediable by the Act. Accordingly, the ALJ should include reimbursement for consequential economic harm resulting from Respondent's unlawful conduct in his recommended Remedy and Order to the Board.

IV. Conclusion

In sum, the credible evidence demonstrates that Respondent simply did not enforce its touted "zero tolerance" policy for fall protection violations until seizing the opportunity to use it as a pretext for discharging Acevedo, one of the Union's most visible supporters at the UT job site in the midst of its anti-Union campaign. Stevenson, Acevedo's partner that day, was also discharged unlawfully, as absent the Union campaign, the credible evidence shows that Respondent's policy was to warn employees – twice – prior to discharging them, absent an egregious violation, as Golphin's was.

Furthermore, the credible evidence shows that Respondent's supervisors and managers chilled employees' protected Section 7 activities by interrogating and threatening them as a

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See Landgraf v. USI Film Products, 511 U.S. 244, 253 (1994). The 1991 Amendments authorized "damages for 'future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.'" *Id.* (quoting Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3)). The NLRA does not authorize such damages. However, even prior to the 1991 Amendments, courts awarded reimbursement for consequential economic harms resulting from Title VII violations as part of a make-whole remedy. *See Pappas v. Watson Wyatt & Co.*, 2007 WL 4178507, at *3 (D. Conn. Nov. 20, 2007) ("[e]ven before additional compensatory relief was made available by the 1991 Amendments, courts frequently awarded damages" for consequential economic harm, such as travel, moving, and increased commuting costs incurred as a result of employer discrimination); see also *Proulx v. Citibank*, 681 F. Supp. 199, 205 (S.D.N.Y. 1988) (finding Title VII discriminatee was entitled to expenses related to using an employment agency in searching for work), affirmed mem., 862 F.2d 304 (2d Cir. 1988).

result of their Union activities, and to ensure that they knew the Union was so unwelcome in Respondent's pockets that employees would be punished if they selected the Union as their collective-bargaining agreement.

For the reasons set forth herein, Counsel for the General Counsel therefore respectfully asks that the ALJ find that Respondent has violated Sections 8(a)(1) and (3) of the Act through all of its conduct described above. Counsel for the General Counsel seeks a Board Order requiring Respondent to immediately:

1. Cease and desist its illegal conduct in all respects.

2. Fully remedy Respondent's unlawfully more strict enforcement of its zero tolerance policy against Acevedo and Stevenson by making them whole for all monetary losses suffered as a result of their unlawful discharges.

3. Fully remedy Respondent's coercive and restraining statements made to employees.

4. Post a Notice to Employees in English and Spanish at its all of its active job sites, as well as mail copies of the Notice to current and former employees.[17]

[17] A proposed Notice to Employees is also attached to this brief as Exhibit 1. Due to the overwhelming evidence presented at the hearing that several of Respondent's employees are native Spanish-speakers, not fully fluent in English, Counsel for the General Counsel respectfully asks that any Notice to Employees Ordered be issued in both languages. Furthermore, due to the ebb and flow of Respondent's workforce, as indicated by the parties' use of the *Daniel-Steiny* eligibility formula in the representation election, Counsel for the General Counsel asks that any Notice to Employees Ordered by mailed to the last known addresses of current and former employees of Respondent.

Counsel for the General Counsel also requests that the Administrative Law Judge order any other relief deemed just and proper to effectuate the purposes of the Act.

Dated this 31st day of March, 2017.

Respectfully submitted,

/s/ Caroline Leonard
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EXHIBIT 1

(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT enforce our rules more strictly because employees support the Bricklayers and Allied Craftworkers, Local 8 Southeast (the Union), and **WE WILL NOT** discharge employees because they support the Union or to discourage others from supporting the Union.

WE WILL NOT threaten or imply that your wages will go down if you select the Union as your collective bargaining representative.

WE WILL NOT interrogate you about your interactions with Union representatives that occur on our job sites.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL offer Luis Acevedo and Walter Stevenson reinstatement as masons on the next available project, **WE WILL** strike all references to the unlawful discharges that occurred on May 17, 2016, from their personnel files, and **WE WILL NOT** consider that discipline when making decisions regarding their employment in the future.

WE WILL make Luis Acevedo and Walter Stevenson whole for any losses they suffered because we unlawfully discharged them on May 17, 2016.

ADVANCED MASONRY ASSOCIATES, LLC
d/b/a ADVANCED MASONRY SYSTEMS

(Employer)

Dated: _____ **By:** _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-

6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlrb.gov.

201 E Kennedy Blvd Ste 530

Tampa, FL 33602-5824

Telephone: (813)228-2641

Hours of Operation: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, Counsel for the General Counsel's Brief to the Administrative Law Judge, was served on March 31, 2017 as follows:

By electronic filing:

National Labor Relations Board
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CASE NO. 18-14163

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ADVANCED MASONRY ASSOCIATES, LLC
d/b/a Advanced Masonry Services

(Petitioner/Appellant)

vs.

NATIONAL LABOR RELATIONS BOARD

(Respondent/Appellee)

A Petition for Review of an Order of the National Labor Relations Board

N.L.R.B. Case No. 12-CA-22114

Tab No: 108

EXHIBIT
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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

ADVANCED MASONRY ASSOCIATES, LLC
d/b/a ADVANCED MASONRY SYSTEMS

and **Case No.: 12-CA-176715**

BRICKLAYERS AND ALLIED CRAFTWORKERS,
LOCAL 8 SOUTHEAST
_____/

ADVANCED MASONRY ASSOCIATES, LLC'S POST-HEARING BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION

This case arises out of an unsuccessful effort by the Bricklayers and Allied Craftworkers, Local 8 Southeast ("Charging Party," "Local 8," or the "Union") to organize Advanced Masonry Associates, LLC d/b/a Advanced Masonry Systems ("Respondent," "AMS," or the "Company"). After the Union filed a representation-certification petition seeking to represent a unit of masons, a mail-ballot election was held in May and June 2016 under the auspices of Region 12 of the National Labor Relations Board ("NLRB" or the "Board"). The result, a 16-16 tie vote with 15 ballots challenged by the Company, was a provisional victory for AMS under Board law. The General Counsel and the Union seek to overturn this fair result, based on a meritless pre-election unfair labor practice charge alleging violations of Sections 8(a)(1) and (3) of the Act, and frivolous objections to the Company's lawful pre-election conduct. The Union also seeks to count the challenged ballots, which should not be tallied based on established Board precedent governing voter eligibility in the construction industry. As set forth herein, neither the General Counsel nor the Union proved their respective cases, while AMS met its burden to sustain the challenges. The Complaint therefore should be dismissed, and the ballot challenges upheld.

II. FACTUAL BACKGROUND

A. The Parties

1. The Company

AMS is a masonry contractor headquartered in Sarasota, Florida (857).[1] The Company's jobs are procured by competitive bid and are located across the State of Florida, primarily in the

[1] Citations to the record will be made as follows: the transcript of the February 6-10, 2016, hearing will be referred to by the pertinent page number(s); joint stipulations and joint exhibits will be referred to as "J.Stip._ and "J.Exh._," the Regional Director's Exhibits will be referred to as

central and southwestern parts of the State (857-58). The Company's owners include Ron Karp and Richard Karp (812-13). The size of the Company's skilled workforce fluctuates depending upon its jobs, with AMS hiring and laying off masons as needed (860). The Company's practice upon completion of a job is to offer masons work at other locations, when available; if no other work is available, the employees are laid off (189, 816). AMS frequently has employed—and continues to employ—union masons (58). It historically has requested labor through Local 8 from time-to-time (260, 861). Several of AMS's foremen are current or former dues-paying members of Local 8, as is the Company's Operations Manager, Marc Carney, who once served as a Union trustee, and as the Sergeant-at-Arms for one of Local 8's chapters (261-62, 376-77, 606-07, 634, 686-87, 754, 782-82).

2. The Union and Michael Bontempo

Local 8 is a labor organization that represents masons (J.Stip.2). At one time, AMS and Local 8 entered into short-term memoranda of understanding governing the Company's periodic employment of Local 8's members (C.P.Exh.14, at 21-22). Pursuant to the memoranda, AMS paid such individuals an agreed-upon wage, and made monetary contributions to Union health, retirement, and other funds based on hours worked by Union masons, and later, for hours worked by non-Union masons as well (316-17).[2]

Michael Bontempo is a former AMS employee (167). He is a 29-year Union member (id.). After a short stint as an AMS mason about the year 2000, during which he made it known that he

"R.D.Exh._," AMS's exhibits will be referred to as "R.Exh._," the General Counsel's exhibits will be noted as "G.C.Exh._," and the Union's exhibits will be referred to as "C.P.Exh._."

[2] While the parties have disputed whether the execution of the memoranda also bound AMS to a multi-employer collective bargaining agreement, and whether the Company then properly withdrew from that agreement effective April 30, 2016 (312-13), the disputes are not part of the instant case, and the parties did not present them to the Administrative Law Judge for resolution.

was a member of the Union (252), Bontempo quit voluntarily to take a job closer to his home (233-34). The Union referred Bontempo back to AMS in 2012 (249-51; R.Exh.39), and the Company rehired him as a foreman[3], a position in which he worked over roughly the next two years. As a foreman, Bontempo was responsible for supervising groups of masons at Company jobsites, and for ensuring completion of work on schedules set by the general contractors (167-68, 234-35). He reported to Carney, who in turn reported to Ron and Richard Karp (812-13). In connection with his return, Bontempo filled out the Company's job application (235-36; R.Exh.40). On the application, Bontempo—who had a prior felony conviction in 1995 for which he had served jail time—admittedly lied and marked "no" in response to a question asking whether he ever had been convicted of a felony (235-38; R.Exh.40). After lying, Bontempo then read and signed a statement on the application document certifying that his answers were true (236-37).

In 2013, Bontempo voluntarily quit his employment with AMS to take a position with the Union as its field representative for the State of Florida, where he reported directly to the individual serving as the Union's president, secretary and treasurer (165-66, 253, 257). As Local 8's field representative, Bontempo developed a good working relationship with Ron Karp, meeting with him several times, and communicating with him via e-mail and telephone (257-60, 861-62). Bontempo maintained a strong working relationship with Carney, too, often calling him daily (292). AMS contacted Bontempo from time-to-time if it needed labor, and Bontempo referred Union members to AMS (260, 861). The Company hired those individuals (203-04; C.P.Exhs.24(a)-(h)). Bontempo often visited AMS's jobsites to speak to the Company's employees, sometimes as frequently as biweekly (175-76, 401-02, 725). Without objection from

[3] At times during the hearing, the Union interchangeably used the words "foreman" and "superintendent" (167). AMS refers to the position as "foreman."

AMS, he distributed Gatorade, pizza, Union t-shirts, and Union hard-hat stickers (231-32, 306-08, 342-43, 402; R.Exh.58; G.C.Exh.12; C.P.Exhs.25(a)-(b)).

3. Luis Acevedo and Walter Stevenson

Luis Acevedo is a former AMS mason. At all times material, Acevedo was a member of the Union, and made the Company aware of that fact (391-92, 397-98; G.C.Exh.13). Acevedo worked for AMS for a short period in 2014, and AMS rehired him in January 2016, after he visited the Company's Sarasota office and filled out a job application and other documents (392-93, 950-51). Among the papers Acevedo signed at that time was a form acknowledging that he had read, or would read, the Company's Employee Handbook, available on-line, or that he would have the Handbook read to him, or that he would request a hard-copy of the Handbook if he could not access the document on the internet (62-63, 67, 949-50; R.Exh.25). Upon his rehire, Acevedo began work at the Company's job at the Westshore Yacht Club in Tampa, Florida ("Westshore"). Afterwards, in April or May 2016, Acevedo moved to AMS's job at the University of Tampa ("UT"), also in Tampa. He was supervised by AMS foremen Coy Hale and Brent "Turbo" McNett at Westshore, and by McNett and foreman Mario Morales at UT (393-94, 616-17).

Walter Stevenson also is a former AMS mason (124-25). He never has been a Union member (124). Like Acevedo, after a short prior stint at AMS, he was rehired and began at Westshore, where he was supervised by McNett, and moved to the UT job under the supervision of McNett and Morales when the Westshore project was complete (125, 148).

B. AMS's Work at Bethune-Cookman University

In late 2014, AMS started work on a large project at Bethune-Cookman University in Daytona Beach, Florida ("Bethune"). AMS employed between fifty and seventy masons at Bethune (862). The job had two phases, Phase I and Phase II, with each phase consisting of a pair

of multi-story dormitory buildings in which AMS worked in the interior and exterior of the structures, laying block, brick, and concrete (651, 815-16, 821, 862). Phase II began in June or July 2015; as of January 2016, while some block work remained at Phase II, brick was being laid, and the Company was hiring additional masons (1046-48). AMS employed masons at Bethune all the way through the completion of the project in mid-2016. It had weekly project-specific payrolls of over $52,000.00 for the week ending April 3, 2016, gradually reducing to roughly $3,500.00 for the week ending June 19, 2016 (865-73, 900-03; R.Exhs.44-53). Once its work at Bethune was completed, AMS warranted the work for a one-year period beginning on September 15, 2016 (862-64, 895; R.Exh.43).

Starting in January 2016, some of the masons at Bethune—including Robert Baker, Jacob Barlow, Jim Clark, Forrest Greenlee, Dustin Hickey, Robert Pietsch, David Wrench, Mark France, and George Reed, quit voluntarily at various times while the job was in progress, including a large group during the first few days of April 2016 (652-54, 719-20, 895-96, 952-55; R.Exhs.27-28). All of the named individuals were supervised by McNett and/or foreman Robert Dutton, who neither terminated them nor laid them off (652-54, 707, 721). When the time came to reduce manpower at Bethune, AMS sent some masons to other AMS jobs (721). The 2016 departures caused AMS to scramble to hit its April 8, 2016, completion date for the block and brick work, a failing which would have resulted in a $25,000.00 per day fine (651-52, 712). Several of the departing masons—Wrench, who left on January 15; Pietsch, who left on March 18; and Reed, who departed on April 15—quit specifically so that they might take other jobs (653, 705, 895-96; R.Exhs.27-28). Another, France, who quit on February 11, left to return to another state, where he rejoined his spouse (712-13; R.Exh.28). It was undisputed that, beyond the April 8 block and brick completion date, critical parts of the Company's work at Bethune remained and continued.

This work included handling the tasks on the general contractor's punch-out list, and AMS's demobilization of the job, each of which items prepared the jobsite for the work to be done by other trades (718-19, 816, 896).

On October 9, 2015, before Phase II at Bethune was complete, AMS terminated mason Robert Harvey, who the Company was billeting in a local hotel, for poor attendance and for not showing up to work on time (656-57, 913-19, 926, 941-50; R.Exhs.29, 60, 60(a)). Also at Bethune, McNett terminated mason John Smith on January 15, 2016, for poor work performance (655-56, 1057; R.Exh.32).

C. Company Policies

1. Union Access to Jobsites

In 2014, on or about the time when AMS began work at Bethune, Bontempo, who by that time had begun his work as Local 8's field representative, and Carney reached a verbal agreement governing when the Union would be permitted to access employees on the Company's jobsites (816-18). Specifically, if Bontempo complied with a general contractor's requirements for site access—typically a safety orientation—he would be allowed to speak to the men before work, after work, during lunch (a thirty-minute period) or during break time (two fifteen-minute long periods) (642, 804-05, 807-09, 816-18, 897). The agreement protected AMS's interest in performing its jobs on schedule, in an undistracted and safe manner, and was identical to the Company's policy regarding anyone else wishing to come onto a jobsite to interact with AMS employees (642, 734, 784-85, 805, 817-19). The agreement, too, benefitted the Union: it envisioned access exceeding the Union's previous practice, in which Union representatives had shown up at lunchtime only (834). Carney knew that Bontempo was a former foreman, and would understand production and schedules (818). And Carney understood the Union's organizational

goals—at the time, he himself was a Union member, whose employment with AMS began in 2000 after the Union referred him (812, 814-15).

The agreement worked as intended. It was well-understood by the parties and consistently enforced by AMS foremen (642, 724-27, 734-36, 757, 784, 803-05, 818, 856, 897).

2. Safety and Fall Protection

AMS treats workplace safety as a high priority. The Company maintains safety rules for purposes of employee protection, OSHA compliance, and adherence to the guidelines of general contractors on its jobs (65, 755). The Company has a Safety Department, headed by Safety Director Aleksei Feliz, whose responsibilities include enforcement of the rules (27-28, 56-57). The Safety Department provides a thorough safety orientation to new employees (57-58, 117-19). Accountability extends beyond the Safety Department, however, to AMS foremen, who are charged with ensuring employee safety, and identifying required safety equipment for the day's work (79). Foremen also deliver weekly "toolbox talks." These talks are mandatory pre-work meetings, up to thirty minutes in length, where employees are addressed on safety topics preselected by the Safety Department (79, 611-13, 755-57).

AMS's safety philosophy further is communicated by several writings. First, the AMS Employee Handbook, available on-line to employees, states the Company's expectations in the area of safety. The Handbook states unequivocally that "Compliance with these safety standards is considered a condition of employment," "It is the responsibility of each employee to accept and follow established safety standards, regulations and procedures," and "Employees must comply with all safety rules" (64-68; R.Exh.2, at 45-48). The Handbook directs employees to bring safety questions to a manager or supervisor, and warns that the violation of safety rules, or the failure to wear required safety equipment, is unacceptable activity which can result in disciplinary action,

including termination (78-79; R.Exh.2, at 20). Additionally, AMS maintains a written Safety and Injury Protection Program (R.Exh.3). The Program is introduced with a policy statement from the Company's management team, stating that AMS policy is to provide employees with a safe workplace; notifying employees that willful violation of a workplace safety rule will result in discipline; and emphasizing again that "Compliance with safety rules will be required of all employees as a condition of employment" (id., at 1).

AMS's written safety materials contain prominent sections on fall protection, necessary because masons and other employees often work on scaffolds at elevations where a fall would cause serious injury or death. The Company's fall protection rule, typical of the industry, is that an employee working at six feet or higher on a scaffold in a setting where a fall risk exists—i.e., where the employee is on a scaffold without guardrails and does not have a solid wall in front of him—must use appropriate protective equipment (54-55). Anyone observed in violation of this rule will be terminated (616). In this regard, AMS's rule is stricter than the ten-foot requirement promulgated by the Occupational Safety and Health Administration ("OSHA") (54-55, 616).[4] The Employee Handbook states "Fall Protection equipment will be utilized at all elevated locations," and "Always wear or use appropriate safety equipment as needed" (65-66; R.Exh.2, at 45-48) (emphasis in original). The Safety Program document contains a section on personal protective equipment, or "PPE" for short. It directs employees to "wear a full body harness with a shock-absorbing lanyard or retractor in all elevated areas not protected by guardrails," and warns that employees must never connect two lanyards, or a retractor and a lanyard to each other (73-74; R.Exh.3, at 12).

[4] See 29 C.F.R. §1926.451(g)(1) ("Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level").

The AMS Employee Handbook also references a separate written Fall Protection Program as a source of additional information for employees (66; R.Exh.2, at 48; R.Exh.4). The Fall Protection Program is covered during an employee's initial safety orientation (69-70). It establishes minimum criteria for AMS employees working above ground floors, or work platforms, stating that the Company's requirements for fall protection start at a six-foot elevation, and stressing that personal fall protection equipment, including a full body harness tied off to a secure anchor point, is necessary when engineering controls cannot provide complete protection (70-72, 518-20, 615; G.C.Exh.2(a), at 5-6, 8; R.Exh.7; R.Exh.4, at 2). The orientation template states, in all-capital letters, "ZERO TOLERANCE TO FALL PROTECTION VIOLATIONS" (72, 518; G.C.Exh.2(a), at 8; R.Exh.7). "Zero tolerance" means termination, with the conditions that the employee must have been trained, and AMS must have witnessed the offense (81, 94, 99-100).

Apart from its writings, AMS has maintained, for years, a fall protection display in the training room at its Sarasota headquarters. The room features a mannequin torso wearing a safety harness, a table displaying anchoring equipment, a Spanish-language poster illustrating proper harness wear and stating (in Spanish) "6 Simple Steps Which Can Save Your Life," and a sign warning "Any FALL PROTECTION VIOLATION will be grounds for immediate TERMINATION" (76-77; R.Exhs.5-6).

AMS provides employees and supervisors with harnesses (with extras kept at the jobsites, inside the supervisor trailer) and other safety equipment, and trains them on these items (55, 114-15, 117, 513, 521-23, 549, 616; G.C.Exh.2(b)). The training includes how to wear the safety harness; the equipment used to tie off; and when and where each piece of equipment is to be utilized (58, 114). "Tying off" means that an employee has secured his safety harness to an anchor point, the nature of which depends on the work setting (114-15, 523, 590-91). If employees' work

location is sufficiently distant from the Company's Sarasota headquarters, Feliz will send his assistant, Safety Coordinator Fernando Ramirez, to the location to talk about fall protection as part of the Company's larger safety orientation (57-58, 117-19, 513-14; R.Exh.7).

D. The Union Election and the Pre-Election Period

1. The Representation-Certification Petition and the Parties' Campaign Activities

On April 29, 2016, the Union filed a representation-certification petition with the Board (312; G.C.Exh.1(a)). The petition sought to represent a unit of AMS masons, and was based on a showing of interest obtained by Bontempo in his visits to the Company's jobsites (175; G.C.Exh.11). AMS and the Union entered into a stipulated election agreement (R.D.Exh.1(c)), and AMS posted Notices of Election at its various jobsites (610-11, 727, 760, 785-86).

The Region directed a mail-ballot election, with eligible voters determined according to the Board's established Steiny-Daniel formula for the construction industry (R.D.Exh.1(c)), at 1-2). Under the formula, any mason employed (i) for at least thirty days during the twelve-month period preceding the eligibility date, or (ii) for at least forty-five days during the twenty-four month period preceding the eligibility date, could vote, with two exceptions: employees terminated for cause, and employees who quit voluntarily prior to the completion of the last job on which they were employed (id.). The eligibility date, in this case, was April 29, 2016 (id.). AMS used its COINS human resources software, supplemented by a review of personnel files, to prepare and timely file its Excelsior list with names and contact information of eligible voters (963-64). The Company also updated the Board agent overseeing the election, prior to the mailing of ballots, upon its discovery of employees who should have been included or excluded from the list (963-65, 975-77, 979-81; C.P.Exhs.2-3). The Union gathered its own information on employees' last known addresses, using AMS' fringe benefit reporting forms (330-32). The Union, too, updated

the Board agent, providing names of employees who AMS purportedly should have placed on the Excelsior list (330-31).

Both parties actively campaigned during the pre-election period. AMS sent flyers to employees setting forth management's position (G.C.Exhs.7(a)-(m)), and Feliz visited the Company's jobsites to talk with voters. One day during the first week of May 2016, Feliz translated a speech by Richard Karp at UT, in which Richard Karp told masons that they would be receiving a ballot, and that the Company wanted employees to vote (103-04, 111-12). Richard Karp did not mention wages or insurance, or indicate how employees should vote, in his presentation (104). When one mason asked whether wages would go down if they decided not to unionize, Richard Karp answered that wages are determined by the market (104-05). Richard Karp did not say that wages would go down if the employees voted "yes" (106). On the same day, and also at UT, Feliz spoke separately in Spanish at lunchtime, where he addressed a group of six to eight Spanish-speaking masons, including Acevedo (25-26, 45, 56, 92-93, 105-06, 121, 846). Feliz outlined why AMS did not want to be associated with the Union, but stressed that it was the employees' decision to make (847-48). Feliz did not threaten the employees, or make promises to them; in particular, he did not say that, if employees voted for the Union, their pay would go down (106, 849, 911). When a mason asked Feliz how he should vote, Feliz replied that employees should vote yes or no depending on what they wanted to do (105, 911). When a mason asked him whether AMS would provide employees with health insurance, Feliz responded that he didn't have that information and couldn't make any promises, but added that, under the Affordable Care Act, it was his understanding that employers had to offer insurance to everybody (105-07, 911-12).

The Union also communicated with employees. The Union mailed flyers to all Union members, including to those who were AMS foremen (715-16). Bontempo continued his regular

visits to AMS jobsites. Among other visits, Bontempo stopped by UT after first calling AMS foreman Mario Morales (760). He informed Morales that he had drinks and shirts to give out (id.). Morales, himself a long-time dues-paying Union member, was on his way home because the work day had ended. He consented to Bontempo's access, inviting him to distribute the drinks and shirts (760-62). When Morales returned to UT the next day, he saw seven or eight employees—including some who were not masons—wearing green union shirts (761, 771-72; G.C.Exh.12). Morales did not ask any employees what Bontempo had done the previous day, as it did not matter to him, and did not speak to either Acevedo or Stevenson that morning (761-62, 765, 772). Nor did he ask whether any employees supported the Union (762). An employee named Eddie Sazo, who served as Morales' straw boss, later volunteered to Morales that Bontempo had passed out Gatorade and shirts (770-71).

Bontempo, however, altered his typical approach to AMS and its employees on some occasions during the pre-election period. Disregarding his agreement with Carney, Bontempo communicated or attempted to communicate with masons at several jobsites during work time, and openly challenged the Company's foremen when he was told that he could not. These occasions tended to be when Bontempo was accompanied by representatives of the Union's International, who he may have been trying to impress with his assertiveness. Specifically:

- At UT, Bontempo and Union representative Marvin Monge arrived one afternoon about 3:00 p.m., while the masons still were working (643-44, 647-48). McNett—a Union member at the time, who knew Bontempo, had his phone number, and previously had called to him to discuss what McNett believed were unjustified negative representations about the Company in a Union campaign mailer—approached the two men at the Conex box[5] (id.). Carney was present, as he was visiting the UT jobsite to talk with McNett about production and schedules (822-23, 831-32). McNett invited Bontempo to photograph the posted election Notice, but Bontempo declined, stating that he was not there for that purpose (643-45).

[5] A Conex box is a mobile storage unit that AMS places on jobsites to store materials, and occasionally to serve as an office (749).

McNett then asked the two Union representatives to leave, because it was working time (id.). McNett, Carney, Bontempo, and Monge together walked off the jobsite to Bontempo's car, where they talked for about forty-five minutes, past quitting time for the day, about the upcoming vote, with McNett asking about health insurance, and about what Union representation would mean for him (645-46, 698-99). Carney, too, asked Bontempo questions about insurance because Carney's wife was undergoing medical procedures which he wanted to ensure would be covered under the Union health plan (276, 823-24). Bontempo and Monge made no effort to speak to any mason at UT once the work day ended (646-47). Bontempo was sociable, giving McNett and Carney Gatorade (308).

- Bontempo arrived several times at jobs in St. Petersburg, Florida, known within AMS as "The Hermitage" and the "Holiday Inn Express" jobs, where Brian Canfield was working as a foreman (725-28, 736-37). At The Hermitage, Bontempo passed out Gatorade and t-shirts (740-42). Canfield had experience with Bontempo's visits; if Bontempo arrived when employees were working, Canfield would direct him to speak to the men when they were on break, on lunch, or before or after work (726-27). On May 24, 2016, Bontempo and Union representatives Ernest Adame and Keith Hocevar arrived at the Holiday Inn job between 2:00 and 2:30 p.m. AMS was running behind schedule, and was preparing the structure for another contractor to place a precast concrete panel known as a hollow-core atop block walls AMS had built (728-30, 739, 743). Canfield shook Bontempo's hand (729). Bontempo asked to speak with "some of the guys," and Canfield asked Bontempo if he could do it after work (729, 743). When Bontempo ignored the request, saying he would be "short and quick," Canfield repeated himself, stressing that the job was behind schedule (id.). Bontempo and his companions retreated to their car, where they remained until the work day ended at 3:30 p.m. (730, 743-44). They then emerged, and Hocevar approached a departing Union mason named Lonnie McDonald (297-98, 731). After observing and hearing McDonald's reaction to the man's approach, Canfield asked Hocevar not to harass the Company's employees (731-32, 744-47).

- At Westshore, after the petition was filed but about two or three days before the Notice of Election was posted, Bontempo arrived without the knowledge of Hale, the jobsite foreman (786-87). Hale walked into one of the buildings under construction, climbing to the third floor, to make sure the floor was stocked with materials (786). He encountered Bontempo and another individual speaking to the masons, before break time (786-87). When Hale asked Bontempo why he was there, Bontempo feigned surprise, retorting "where's this coming from?" (id.). Hale reminded Bontempo "you know the rules. You're not supposed to be on the job, talking to the guys during work hours. It's either lunchtime or after work" (787). He told Bontempo and his companion to leave (id.). Bontempo appeared to depart, but slyly moved to another part of the building, where he continued talking to employees (id.). Hale caught sight of Bontempo again (id.) He hollered at Bontempo to leave, which he finally did (787-88).

No AMS supervisors impeded Bontempo in any way when he communicated with masons at the times he and Carney had agreed upon roughly eighteen months earlier. In particular, no supervisor told Bontempo he was per se unwelcome, or changed his approach to him (732, 787, 822).

2. The Events of May 16, 2016

On Monday, May 16, 2016, Acevedo and Stevenson were working at the UT job, under the supervision of McNett, who was assisted by Morales (617, 669, 759-60). AMS's project at UT entailed masonry work on a tall, two-story athletics building, with work on both the inside and outside of the structure (126, 394-95, 617-18). The outside work involved laying a brick veneer over walls which were forty feet in height, and the inside work was to build stairwells, and lay brick veneer around eighteen- to twenty-foot high, four-foot wide, floor-to-ceiling columns on each floor (126-27, 143, 396, 617-19, 669-70). Under AMS's fall protection rule, the outside work needed protection only in places at the open ends of the scaffolds; otherwise, employees working at elevation had a wall in front of them and guardrails behind them (418-20, 519-20, 619, 715). In contrast, any inside work done at elevation needed fall protection, because the individual scaffolds were not as elaborate, and because the seven-foot width of the scaffolds, set against to the narrower columns under construction, left sides and ends open (619-20).

Employees began the day on May 16 by attending a pre-work safety meeting led by the UT general contractor, EWI, followed by a toolbox talk led by McNett (137, 620-21, 700; R.Exh.14). While the primary subject matter of the talk was rigging for safe lifts (R.Exh.14), McNett used the time to remind employees of the Company's fall protection rule. He told employees that some of them were being moved from outside work to inside work, and that, when the employees inside "hit six foot," they were going to have to tie off (621, 762-63). McNett added that the scaffolds

were six-and-one-half feet tall, meaning that anyone working on the top walking plank would have to be tied off (id.). The scaffolds in question had a stable location—the main structural supports—for this purpose (621-22). McNett gave this reminder because he wanted no excuses for not tying off (621). He specifically warned that anyone not correctly tied off would be fired (622). An employee at the toolbox talk brought up wages in the context of the upcoming election, and McNett opined that, as a Union member, he had the most to lose if AMS was non-Union, because he was not yet vested in the Union pension plan (648).

Both Acevedo and Stevenson attended McNett's toolbox talk and signed the attendance sheet (622-23; R.Exh.14). Neither Acevedo nor Stevenson asked any questions about the need for fall protection, or how to tie off properly, and neither alleged that OSHA regulations prohibited tying off to scaffolding (622). Such a legal interpretation would have been incorrect, as OSHA expressly permits the practice.[6]

In fact, both Acevedo and Stevenson had been trained enthusiastically on fall protection, by Ramirez, at their previous AMS job at Westshore (122, 131-32, 514-15; R.Exh.7). The training, part of a seventy-five minute safety orientation, was consistent with AMS's various safety programs and rules, and took place on the morning of February 9, 2016, in a jobsite parking lot before work began for the day (29, 515-16, 555-56, 578-80, 602-03). Ramirez, who is bilingual and fluent in Spanish, taught from a document entitled "Activity Hazard Analysis" (517, 548; R.Exh.7; G.C.Exh.2(a)), and an illustration of proper harness technique (520; G.C. Exh.2(b)). He went over fall protection, anchor points, ladders, scaffolding, and heavy equipment (515). To

[6] In 1996, OSHA issued a standard interpretation letter confirming that scaffolds could be used as anchorage points for personal fall arrest systems. The letter is accessible, in both English and Spanish, on the agency's website. See Standard Interpretation for Standard 1926.502, "OSHA's policy regarding the use of scaffolds as fall arrest system anchors," dated February 14, 1996, available at https://www.osha.gov. Standard Interpretations are under the "Regulations" tab.

demonstrate proper harness fit, Ramirez placed a harness on a dummy, and donned one himself (520-21). Ramirez stressed during the training that work at six feet or higher, combined with exposure to a fall, required use of fall protection at AMS, and demonstrated the proper way to tie off using various pieces of protective equipment (29, 131-33, 515, 517-21, 530-31, 557-62, 564-65). He specifically told employees how and where to tie off to scaffolding (523). Ramirez also carefully showed employees how not to tie off (529-30, 562-63). Referring to the illustration, Ramirez instructed employees that AMS used retractable lifelines (known among employees as a "yo-yo") when tying harnesses off to scaffolding, because the goal was to have three feet of clearance from the ground following a fall (524-26, 559, 679-81; G.C.Exh.24). A six-foot safety strap (677; G.C.Exh.21) could be used when the employee's anchoring point was above his shoulders, or on the scaffold in conjunction with the retractable lifeline if the employee looped the strap inside of itself to shorten it substantially. These techniques, which Ramirez demonstrated, also gave the same minimum clearance (526-29).

Acevedo and Stevenson attended the entire orientation training session at Westshore (516). Acevedo commented that he had his own harness, and therefore didn't need AMS to issue one to him; rather, he needed only a six-foot safety strap and a concrete anchor (531). Ramirez inspected Acevedo's personal harness, approved it, and later provided Acevedo with the additional equipment he needed (531-32). Several employees, including Acevedo and Stevenson, asked questions during the orientation (565). Acevedo asked how to tie off to anchor points, especially using the six-foot strap, which Ramirez explained (533-34, 564). And in response to a question from Stevenson, Ramirez emphasized to everyone in attendance that anyone caught by AMS working at six feet or higher without proper use of fall protection would be terminated pursuant to the Company's zero tolerance policy on this point (532, 565). Both Acevedo and Stevenson signed

the orientation attendance sheet, as did the other employees in attendance at Westshore that day (516-17, 557, 581-82; G.C.Exh.2(c)).

Shortly after the conclusion of the toolbox talk on May 16, Morales toured the UT worksite (763). The inside work on the columns was being done by masons working together in pairs, one pair for each column (396-97, 670-71). Morales observed Acevedo and Stevenson working on a column, up on an open scaffolding, above six feet, with neither man wearing his safety harness (491-93, 763-64). The situation presented a fall risk (764-65). Morales, surprised, questioned Acevedo and Stevenson, asking "weren't you at the meeting? … Turbo just got done saying you got to be tied off when you're above six feet" (763). When Acevedo replied dismissively, saying that he hadn't been tied off when working on the outside part of the building, Morales reminded him that those circumstances were different—when outside, Acevedo and other masons had used a different type of scaffold, and had had a wall in front of them (763-64). Acevedo then brushed off Morales' concern for the second time, saying that he wasn't going to fall (764). Both masons claimed their harnesses were in their vehicles (764). Morales made Acevedo and Stevenson climb down from the scaffold and retrieve their harnesses (158-60, 764).

Morales proceeded to speak with McNett, who was doing some paperwork, at about 8:00 a.m. on May 16 (624, 764, 767-68). Morales reported that Luis Acevedo and Walter Stevenson were on a scaffold and not tied off, and that he had directed them to retrieve their harnesses (624, 766). McNett responded "Tell them it's a good thing I didn't catch them, and make sure they get tied off properly" (624). McNett then finished his paperwork. He walked through the building to check on everyone (625). When McNett reached the second floor, he saw Acevedo and Stevenson, who had returned to their previous positions atop their scaffold (625). He immediately saw that the two masons were tied off incorrectly (id.). Acevedo had hooked his six-foot strap to the back

of the scaffold, and attached his "yo-yo" retractor to the strap; had Acevedo fallen, the devices combined in this manner were too long, and Acevedo would have impacted the ground with his lower body (625-26). For his part, Stevenson had tied off in such a way, with his retractor hooked to both the scaffold and his six-foot strap, as to risk breakage or malfunction of the equipment if he fell, with a resulting ground impact (626-28). McNett looked, but saw no one else tied off improperly (630, 675-76).

McNett told and showed Acevedo and Stevenson what they had done wrong, demonstrating the techniques that Ramirez earlier had taught at Westshore (139-40, 475-76, 628-29). He told Acevedo that he could have hit the ground (id.). Acevedo repeated confidently that he wasn't going to fall, and then loudly and self-servingly lied, insisting that he'd never been trained on how to tie off to a scaffold (477-78, 629-30). He also contended, incorrectly, that OSHA didn't require tying off to a scaffold (id.). Stevenson, too, denied receiving training (630). McNett answered that no one plans on falling, and that's why such incidents are called "accidents" (629). He questioned how two employees who had come from Westshore, a project which had involved work at substantial elevation, could claim not to have been trained (630-31).

McNett was familiar with the Company's zero tolerance fall protection policy (615-17). He called Feliz and recounted what had happened (631). In particular, he related that he had two employees who were claiming that AMS had not trained them on how to tie off and use harnesses (id.). When Feliz asked where the two employees had come from, McNett said that they had come from Westshore (id.). Feliz answered that everyone on that job had been trained (id.). He told McNett that he would have Ramirez investigate, and if the employees in fact had been trained, and had signed for such training in the orientation "book," they would be dismissed (631, 700-01). Feliz and Ramirez then spoke via telephone (89, 534-35, 567). Feliz described receiving a call

from McNett that two masons at UT, formerly at Westshore, were in violation of the Company's fall protection rule (89, 110-11, 535). He directed Ramirez to visit the UT jobsite and investigate, and to ascertain whether the two masons had been trained properly on fall protection (89-90, 111, 535).

Ramirez arrived at UT around 12:00 p.m., with the Westshore orientation booklet. He spoke with McNett, showing him the booklet and the signatures in it (631-32, 701). McNett said that he and another supervisor had observed Luis Acevedo and Walter Stevenson working at elevation above six feet and not using fall protection correctly, and that both masons had claimed no one had ever trained them on fall protection (535, 568, 632). Ramirez walked over to where Acevedo and Stevenson, who had descended from their scaffold (569-70), had been working (569-70). He observed that the scaffold had places where a fall risk existed, and that the scaffold was appropriate to tie off to, with a place on the frame for that purpose (537, 567-68). Holding the orientation booklet in his hand, Ramirez asked the employees whether they remembered being trained on fall protection at Westshore, as part of an hour and fifteen minute orientation (536, 568). Both Acevedo and Stevenson confessed that they did remember (id.). Ramirez showed them their signatures on the attendance page (536, 569).

Ramirez contacted Feliz. He confirmed the fall protection violation; related that he had trained the two masons personally; conveyed that he had documented their training; and described how the masons had conceded their attendance (41-42, 76, 90-91, 111). Feliz, who wanted to review the training documentation himself before making a final decision, advised Ramirez to fill out Employee Warning Notices for the employees, which Ramirez did (41-42, 90-91, 537; G.C.Exhs.5-6). On each form, Ramirez first placed an "x" in the boxes for "safety violation" and "violation of company policy" (539-40). He next summarized the circumstances calling for

discipline, and marked the "suspension" box showing the action to be taken (id.). Per Feliz's instruction, Ramirez, along with McNett, told the two masons that they were being sent home for the day, pending a decision on their continued employment with AMS (537-40, 569, 633). Ramirez presented the Notices to Acevedo and Stevenson, and each man signed. Ramirez then returned to Sarasota (540-41).

Upon reviewing the Warning Notices and the training documentation himself that evening, Feliz learned the names of the employees involved for the first time (52). Feliz also recalled, from his prior interactions with Acevedo, that Acevedo was a Union member. While Feliz had the authority to terminate employees for a fall protection violation, and had done so before for AMS (96-97; R.Exhs.33-34), Feliz knew that a Union vote was coming up, so he talked with Ron and Richard Karp. He described the circumstances—including the fact that the employees, who he did not specifically name, had been observed in violation by an AMS foreman—so that the two principals might okay his decision to dismiss (91-94, 119, 873-74, 879-81). It was not unusual at AMS for consultation with management to occur prior to an employee's discharge (188). After discussing the matter with Richard Karp, Ron Karp told Feliz that the policy was the same for all employees, regardless of what was going on (93-94, 874, 881). He said that, if Feliz was confident that the employees had been trained properly, he trusted Feliz and Feliz could move forward with the decision (id.). Feliz decided to terminate the two employees, and signed Acevedo's Reason for Leaving Form himself (52; G.C.Exh.9). He called McNett, and informed him that Acevedo and Stevenson were to be dismissed (633-34).

McNett informed Acevedo and Stevenson of the Company's decision the following morning, May 17, 2016, when the masons arrived at UT (100, 141, 634). He signed Stevenson's reason-for-leaving form (635-36; G.C.Exh.10). Upon being told of his dismissal, Acevedo was

irritated that he'd had to drive all the way from his house to receive the news (478-79). For the first time, he suggested that the dismissals were because the employees were Union (428-31, 477, 634-35). Stevenson, though, was not a Union member, had no interest in becoming one, and had neither advocated for the Union nor worn any Union clothing during the campaign (145, 147). McNett calmly denied Acevedo's accusation, saying that it made no sense (634-35). McNett was a Union member himself and had no bias against Union members, and Acevedo and Stevenson plainly had violated the Company's fall protection rule (id.). Over the course of his employment at AMS, moreover, McNett had terminated other employees for fall protection violations: at the beginning of 2016, an employee named Timothy Golphin, who was witnessed by another AMS employee at elevation, not tied off, and talking on his cell phone (637-38, 672); and Brandon Carollo, who McNett witnessed in February 2016 working at elevation with his harness off and lying beside him (638-40).

Both employees called Feliz the next day (94). Acevedo demanded that his termination be changed to a layoff, so that he might receive unemployment (id.). Feliz declined, and AMS went on to oppose Feliz's subsequent claim for benefits, filed with the Connecticut Department of Labor (94, 478; R.Exhs.20-21). Stevenson, too, called Feliz. Contrite, he told Feliz that he "got it" and "we were wrong" (94). Stevenson said that he hoped for another chance down the road (id.).

3. The Results of the Election

The election was conducted by mail, with approximately 110 eligible voters (R.D.Exh.1(d)). The Board mailed the ballots on May 26, 2016, and tallied them on June 9, 2016 (id.). The outcome was a 16-16 tie (id.). Two ballots were void, and AMS challenged fifteen ballots, fourteen of which remained for resolution at the hearing (R.D.Exh.1(d)-(e)). Nine of the fourteen surviving challenges, on ballots cast by Robert Baker, Jacob Barlow, Jeremy Clark, Mark

France, Forest Greenlee, Dustin Hickey, Robert Pietsch, George Reed, and David Wrench, were for employees who worked at Bethune and voluntarily quit prior to the completion of that job (R.D.Exh.1(e)). The remaining five challenges, on ballots cast by Acevedo, Stevenson, Robert Harvey, Raymond Pearson, and John Smith, were for employees terminated for cause (id.).[7] The tie meant that AMS prevailed pending the resolution of the challenges, as a majority of those voting had not chosen the Union (R.D.Exh.1(d)).

III. ARGUMENT AND CITATION OF AUTHORITY

A. The Complaint Must Be Dismissed

The conformed Amended Complaint in this action alleges three distinct violations of the Act by AMS. First, the Amended Complaint alleges that AMS, through Morales, interrogated employees about their Union activities, in violation of Section 8(a)(1) (G.C.Exh.1(r), at ¶ 5). Evidence adduced by the General Counsel at the hearing was that the alleged interrogation took the form of an uncorroborated conversation between Morales and Acevedo, the morning after one of Bontempo's visits to the UT jobsite to distribute t-shirts and Gatorade, in which Morales allegedly asked Acevedo, whose first language is not English, what documents he had signed (406-07). Second and also in violation of Section 8(a)(1), the Amended Complaint alleges that McNett and Feliz, on separate occasions in May 2016 at the UT jobsite, threatened employees with reduced wages if they voted for the Union (G.C.Exh.1(r), at ¶ 6). On this claim, hearing evidence adduced by the General Counsel was that (i) Feliz, during his talk in Spanish with AMS masons who spoke that language, stated to Acevedo and others in attendance that hourly wages would be reduced by

[7] During the vote tally, the Union challenged seven ballots, which AMS later decided not to contest, meaning that those ballots were not counted. The Board agent challenged the ballots of eight employees (among them Baker, France, Harvey, Pearson, Pietsch, Reed and Wrench), but the General Counsel declined to defend the Region's challenges during the hearing.

roughly $4.00 per hour in the event of a Union election victory (410-11); and (ii) McNett, during a pre-election Monday-morning toolbox talk at UT, allegedly addressed employees, including Stevenson, and opined that, while "he wasn't allowed to talk about it," the Union "probably wouldn't be good for wages" (128-30, 145-46). Third and last, the Amended Complaint pleads a violation by AMS of Section 8(a)(3), asserting that AMS, when it suspended and discharged Acevedo and Stevenson on May 16-17, 2016, for violating its fall protection rule, enforced that rule in a stricter fashion than normal, because employees joined and assisted the Union, and to discourage employees from engaging in this and other concerted activities (G.C.Exh.1(r), at ¶ 7). While Acevedo was a Union member and workplace advocate (497), Stevenson was neither. To explain the fact that Stevenson was similarly situated to Acevedo for purposes of the discipline imposed, the General Counsel in its opening statement claimed that AMS fired Stevenson as a deception, to cloak its unlawful animus towards Acevedo (15-16).

Simply stated, in this case the General Counsel did not sustain its burden of proof on any of the three claims, and the Complaint therefore must be dismissed. Moreover, even if the General Counsel met its burden under Section 8(a)(3), AMS successfully proved an affirmative defense, known as the Wright Line defense and named after an eponymous Board decision, which for that particular claim also must result in a dismissal.

1. The 8(a)(1) Claims Fail, Because Witness Credibility Disputes Must Be Resolved in Favor of AMS

Section 8(a)(1) of the Act makes it unlawful for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by Section 7 of the Act, including the rights to self-organization, and to form, join, or assist a labor organization. The standard used when evaluating whether an employer's statement or conduct violates Section 8(a)(1) is whether the statement or conduct has a reasonable tendency to interfere with, restrain, or coerce protected

activities. See Station Casinos, LLC, 358 N.L.R.B. 1556, 1573-1574 (2012); Yoshi's Japanese Restaurant & Jazz House, 330 N.L.R.B. 1339, 1339 fn. 3 (2000). The Board considers the totality of the circumstances in assessing the "reasonable tendency" of an interrogation, ambiguous statement, or veiled threat to coerce. KSM Industries, 336 N.L.R.B. 133, 133 (2001); Rossmore House, 269 NLRB 1176 (1984), enfd. sub nom. Hotel & Restaurant Employees Local 11 v. N.L.R.B, 760 F.2d 1006 (9th Cir. 1985). At all times, the General Counsel bears the burden of proving an 8(a)(1) claim by a preponderance of the evidence. See, e.g., Bates Paving & Sealing, Inc., 364 N.L.R.B. No. 46 (2016).

In this instance, the success or failure of the 8(a)(1) claims rides entirely on the credibility of the parties' hearing witnesses, whose accounts are strongly opposed. The General Counsel's witnesses contended that AMS supervisors and agents made the alleged unlawful question and statements; the Company's witnesses, including but not limited to the supervisors in question, denied those utterances. The Administrative Judge will have to weigh the believability of each witness carefully, taking into account demeanor at the hearing; witnesses' ability to remember past conversations and events; the consistency or inconsistency of the witnesses' hearing testimony with past statements under oath, documentary evidence, items not in dispute, and testimony of other witnesses; the positions held by the witnesses and their possible bias or interest in the outcome of the case, and which party's version of events appears more logical in the circumstances. PPG Aerospace Indus., Inc., 353 N.L.R.B. 223, 224 (2008); Leather Agent, Inc., 330 N.L.R.B. 646, 651-62 (2000); Western Health Clinics, 305 N.L.R.B. 400, 401 (1991).

a. The Alleged Interrogation by Morales

The General Counsel's 8(a)(1) claim alleging interrogation was based solely on the testimony of Acevedo, who stated briefly and without elaboration that Morales had approached

him in the parking lot of the UT job the morning after one of Bontempo's visits following the posting of the Notice of Election, asking what papers Acevedo had signed (406-07, 488-89). Acevedo did not respond (407). The conversation was not corroborated by any other witness, and Morales denied speaking with Acevedo at all that day (762, 772). Morales is a seventeen-year dues-paying Union member who participates in the Union's pension plan, and who has participated in the Union health plan (754). He has had Union members on his work crews since he has been with AMS, and he testified that whether or not employees belong to the Union has no impact on how he manages them (765). Morales worked with Bontempo when Bontempo was an AMS employee, and he testified that he had "no problem" with Bontempo leaving to work for the Union (758-59). He added, without rebuttal from the Union or the General Counsel, that not only had Bontempo called him prior to the UT jobsite visit in question, but that he, Morales, had consented to the visit, as work at the site had finished for the day (760-61). Morales arrived the following morning, saw several employees wearing Union t-shirts, and did not care, as Bontempo had advised the previous day that he planned to distribute the shirts (761-62, 771-72). Morales did not ask any employees whether they supported the Union (762).

Put bluntly, the allegation that Morales interrogated Acevedo does not comport with common sense, given Morales' active Union membership and because AMS, at all times, already knew that Acevedo was a Union member and supporter: Acevedo indicated his membership before his January 2016 rehire, and by his own admission, frequently wore his Union t-shirt to work, and also wore his hardhat emblazoned with multiple Union stickers for the entire duration of his AMS employment (443-44, 480-81). And Acevedo's account on cross-examination was revealing—he elaborated that Bontempo disseminated health insurance papers during his visit, and that both Morales and McNett, who Acevedo knew to be long-time Union members with more

hours than him, asked him not about authorization cards, but about Union insurance benefits, a subject in which all three employees had a common and legitimate interest (485-89). Bontempo confirmed during his testimony that, in addition to a shirt and Gatorade, he had given Acevedo a Union health plan application during the pertinent UT visit (402-04).

Furthermore, when determining who is telling the truth, the Administrative Law Judge carefully should consider the demeanor of the respective witnesses. Morales displayed no bias or hostility towards Acevedo, or indeed towards anyone. In contrast, Acevedo used the hearing to level a wide variety of additional allegations against Morales, other foremen, and the Company, all of which were denied and none of which were supported by anyone else: Acevedo alleged that AMS failed to promptly honor his request for dues deduction (399-401, 792-93); claimed that on the day Bontempo arrived at UT to distribute shirts and Gatorade, employees had had to work overtime on a hot afternoon without a break or water, forcing him to ask Bontempo for something to drink (403, 481-88); asserted that McNett threatened employees "all the time" by saying that, if anyone made a mistake, employees would have to fix it on their own time with no pay (417-18, 614-15); alleged that he had risked his life working outside at UT without a safety harness (despite owning a harness himself) (427); and contended that he had complained to Morales and Feliz, fruitlessly, about unsafe working conditions, specifically a gap in the scaffold floorboards, present while he was working at sixty to seventy feet of elevation outside at UT, which he then had to repair on his own (444-45). It cannot be gainsaid that Acevedo has strong motives to support the General Counsel's case, as the Board is seeking his reinstatement with backpay (16-17).

Even if Acevedo's account is credited in part, the claim still lacks merit. Factors considered by the Board in its totality-of-the-circumstance analysis include the background of employer hostility, if any; the nature of the information sought; the identity of the questioner; the place and

method of interrogation; the truthfulness of the employee's reply; the existence of a valid purpose of the questioning; and whether such valid purpose was communicated to the employee. Evolution Mechanical Servs., Inc., 360 N.L.R.B. No. 33 (2014); Paceco, a Div. of Fruehauf, Corp., 247 N.L.R.B. 1405, 1405 (1980). These factors cut sharply in favor of AMS here. In its most basic terms, the sequence of events identified by the General Counsel involves a long-time Union-member foreman, who participated in the Union's health plan, casually asking a Union-member employee and supporter about health insurance after a jobsite visit by the Union's representative which the foreman expressly condoned and during which the representative passed out health plan information. No witness testified to coercion, and the purported interaction, being innocuous, lacked a reasonable tendency to coerce. Even Bontempo, when given the chance to claim that Morales possessed anti-Union animus, declined to do so (369-70). In sum, the Company is entitled to prevail on this claim.

b. The Alleged Threats by Feliz and McNett

The General Counsel's 8(a)(1) claims alleging employer threats are based on the testimony of Acevedo, who claimed an unlawful statement by Feliz, and of Stevenson, who claimed an unlawful statement by McNett. At the hearing, Acevedo contended that Feliz, during his pre-election talk at UT to Spanish-speaking masons, specifically told the masons to vote "no" because the Union was taking their money, and warned that if the employees voted "yes," their hourly wages would be reduced from $22.00 per hour to around $18.00 per hour (410-11). Acevedo testified that he piped up in rebuttal, saying "it's not true," and that Feliz responded by glaring angrily at him (411-12). Feliz, for his part, denied making the alleged statement. He described his communications to Spanish-speaking masons, both independently and as a translator for Richard Karp, as largely informational in nature, setting forth the Company's position and

reminding employees to vote in the election one way or the other (104-05, 848). Feliz cautiously translated or answered questions from masons about wages and benefits, noting his interpretation of the Affordable Care Act, but did not promise or threaten anything (id.).

Next, Stevenson asserted that McNett, during a Monday-morning safety meeting held at the UT jobsite, addressed the crew and pointedly warned that, while "he wasn't allowed to talk about it," the Union "probably wouldn't be good for wages" (128-30, 145-46). Stevenson "kind of walked away," and recalled nothing more (146-47). McNett denied making any such statement (605-08, 614-15). Rather, he testified that, during a toolbox talk prior to the election, he honestly answered questions by employees. When asked whether AMS had health insurance, he answered that it did, but that he didn't know how it worked, because he had the Union's insurance (613-14). He said that he could get information if the employee wanted (id.). Similarly, when asked whether the Company had a 401(k) plan, and whether the Company matched employee contributions, McNett replied that AMS did have a 401(k) plan, and used to match, but didn't anymore (614). Another AMS mason present at this gathering, Gerardo Luna, remembered McNett saying that the Union had been assessing AMS for benefit contributions for all masons, not just Union masons—a true statement—and urging employees to vote in the election, saying that whether the employees wanted to be Union or not was their option, and would be the product of their private vote (854-55).

For both of these claims of unlawful threat, the Company's account of events is more credible than that of the General Counsel. The allegation that Feliz threatened masons with a $4.00 per hour cut in wages if they unionized does not make sense, as he just had finished translating a statement from one of the owners of the Company that the market, not AMS, sets pay. Moreover, Feliz personally was shown to lack anti-Union animus. On behalf of AMS, Feliz hired numerous

Union masons, including Acevedo after Acevedo wrote the Company in 2015 asking for work as "a certified Union mason for over 9 years," and including his telephone number (59-61; R.Exh.22). Acevedo later expressed his gratitude (408-09). Continuing, Acevedo's account of Feliz's demeanor during his presentation to Spanish-speaking employees is belied by Feliz's careful, diplomatic style, which the Administrative Law Judge saw during the hearing. Finally, Feliz's version of events—unlike Acevedo's—was substantially corroborated by the testimony of Luna, who spoke Spanish and was present during this meeting as well (846-50). Luna recalled that, while Feliz "mentioned some things about wages," he "never told us not to vote for the Union," made no threats to employees, and said "nothing about offering extra wages for people who would be with or not with the Union" (847-48).

Stevenson's account of McNett's statement is equally improbable. At the time of making the alleged statement about wages, McNett was a dues-paying member of the Union who participated in the Union health and pension plans (605-07). McNett flatly denied making any statement about what might or might not happen to wages if the Union won the election (615). He also denied ever telling employees that the Union health plan "was no good," or that the Union was "stealing money" from its members, although he did relay that two AMS employees under his supervision informed him that the Union, in their opinion, had deceived them into signing up (608). No one had ever tricked him, however (690). Prior to the hearing, Bontempo had not heard the allegation about McNett from Stevenson before; although Bontempo claimed to have heard it from Acevedo, he took no action to file or amend an unfair labor practice charge, which suggests that he himself did not believe it (349-52). Pointedly, in addition to Stevenson's charge, Acevedo leveled an additional allegation against McNett, claiming that McNett frequently bad-mouthed the Union, to the point where Acevedo became tired of hearing it (407-08). But bad-mouthing the

Union, even assuming it occurred, is not the basis for an 8(a)(1) violation. See, e.g., Children's Center for Behavioral Development, 347 N.L.R.B. 35 (2006) ("[i]t is well settled that an employer may criticize, disparage, or denigrate a union without running afoul of Section 8(a)(1), provided that its expression of opinion does not threaten employees or otherwise interfere with the Section 7 rights of employees"); Trailmobile Trailer, LLC, 343 N.L.R.B. 95 (2004) ("[w]ords of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1)"). Like the claim centered on Morales, these 8(a)(1) claims must be dismissed as well.

2. The 8(a)(3) Claim Fails, Because the Union Has Failed To Establish a Prima Facie Case; the Company Has Established Its Wright Line Defense; and Witness Credibility Disputes Must Be Resolved in Favor of AMS

Section 8(a)(3) of the Act makes it unlawful for an employer to encourage or discourage membership in a labor organization by discriminating in regard to any term or condition of employment. 29 U.S.C. § 158(a)(3). In an employee discharge case where an 8(a)(3) violation is alleged, the shifting-burdens framework set forth in Wright Line, 251 N.L.R.B. 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), applies: the General Counsel first must demonstrate, by a preponderance of the evidence, a prima facie case consisting of facts allowing for an inference that by the employer acted to discourage membership in a labor organization by terminating the employee. Such discriminatory motivation may be shown by establishing an employee's protected activity, employer knowledge of that activity, and the expression of animus against the employee's protected conduct. Donaldson Bros., 341 N.L.R.B. 958, 961 (2004); Naomi Knitting Plant, 328 N.L.R.B. 1279, 1281 (1999). Discriminatory motivation also may be inferred from the timing of the adverse action in relation to the protected activity, combined with evidence demonstrating that the employer's proffered explanation for the adverse action is a pretext. Baptist Med. Ctr./Health

Midwest, 338 N.L.R.B. 346, 377 (2002); Washington Nursing Home, Inc., 321 N.L.R.B. 366, 375 (1996).

If the General Counsel meets this burden, the employer then may avoid liability by proving, by a preponderance of the evidence, that the discharge would have taken place even absent the employee's Union activities. Wright Line, 251 N.L.R.B. at 1089; Septix Waste, Inc., 346 N.L.R.B. 494, 496 (2006); see generally N.L.R.B. v. Allied Med. Transp., Inc., 805 F.3d 1000, 1007 (11th Cir. 2015). Such proof can include an employer's showing, by a preponderance of the evidence, that it treated similarly-situated employees in the same manner without regard to Union activities or affiliation. See Auto Nation, Inc., 360 N.L.R.B. 1298, 1302 (2014) (finding that "the General Counsel has not established sufficient grounds on which to reject the [employer's] credited testimony" regarding similarly situated employees); Engineered Comfort Sys., Inc., 346 N.L.R.B. 661, 662 (2006) (reversing ALJ finding of an 8(a)(3) violation, because in response to employer's rebuttal showing, "[t]he General Counsel failed to present significant countervailing evidence of disparate treatment of similarly situated employees").

As with the 8(a)(1) allegations, when compared to AMS's witnesses, the General Counsel's witnesses described pertinent events in an entirely different way. In Acevedo's telling, McNett began May 16, 2016, with a toolbox talk in which he did not remind employees about fall protection and made his customary threat that employees would fix any mistakes on their own time with no pay (417-18). Afterwards, but before Acevedo started work for the day, Morales approached, asking whether Acevedo had a harness, because there were not enough harnesses for everybody (420). Acevedo replied that he had his own, and retrieved it from his car (421). He began working inside at UT on the columns, paired with Stevenson (id.). Upon donning his harness, he tied off to the scaffold, which was of a different kind than the scaffold used outside,

by attaching one end of his yo-yo to the scaffold and the other to a strap, which in turn was secured to his harness (418-22).

At about 8:30 a.m., McNett approached Acevedo. Referring to Acevedo's harness, he allegedly screamed "WHAT ARE YOU DOING? YOU'RE NOT SUPPOSED TO TIE THIS LIKE THAT" (423). McNett took Acevedo's equipment, and demonstrated proper technique, wrapping the strap around the scaffold (id.). Acevedo replied that under OSHA regulations he was not supposed to tie off to a scaffold (id.).[8] When McNett asked whether Acevedo had received orientation training on how to tie off to scaffolding, Acevedo denied it (423-24). When Ramirez next arrived with the Westshore training "book" containing Acevedo's signature, Acevedo continued to deny being trained. He insisted that he had not received the safety orientation in question, and repeated that it was illegal to tie off to scaffolding (425-26). McNett, for his part, allegedly resumed screaming at Acevedo when Ramirez presented Acevedo with the Employee Warning Notice sending him home for the day (426).

The next morning, when Acevedo arrived at work, McNett loudly fired him, yelling that Acevedo had lied (428-29). Acevedo repeated for the third time that OSHA regulations prohibited tying off to a scaffold, and then asked whether he was being discharged because he was a "union guy" (428-31). McNett allegedly responded by smiling and telling Acevedo that, not only was he fired, but that "this is America, fight for your rights" (429, 477). Acevedo called Feliz, who said there was nothing the Company could do (430).

Stevenson's story of what happened on May 16, 2016, deviated not only from the account of AMS witnesses, but from Acevedo's. With prompting from the General Counsel, Stevenson testified that he had been working inside at UT on a scaffold, more than six feet up and without

[8] This is not correct, as OSHA specifically allows the practice. See infra at n.6.

fall protection, only to be told on the morning of May 16 that employees had to tie off from now on (137-38, 143). Stevenson had not tied off earlier while working on the project's exterior walls (139). Stevenson conceded that he had started the day on May 16 not wearing a harness, only to reach a height where he needed to tie off (154-56). Stevenson claimed that he then put on his harness, hooking his yo-yo to the scaffold (139). He testified that McNett proceeded to present him, and Acevedo, with Employee Warning Notices sending them home, informing the masons that they were not tied off properly (139). Stevenson admitted that McNett explained that he should have taken his six-foot long strap, which has a loop at each end, and "cinnamon rolled" the strap by wrapping it around and around a bar of the scaffolding. Stevenson then should have passed one end of the strap through the other, and then hooked the now-anchored strap to the retractable lifeline in his harness (139-40). But Stevenson claimed he told McNett that he'd never been told to tie off like that (140). McNett purportedly replied that it wasn't in his hands, and that he'd been told to send him home (141).

Both masons, at the hearing, testified in more detail as to their training, or the alleged lack thereof. As with their description of the events of May 16, accounts materially differed. In contrast to Ramirez's energetic and earnest testimony about his regular and thorough safety orientation training of AMS employees, including Acevedo, Acevedo denied receiving anything more than a single, short, bare-bones training on fall protection, limited to how to wear a harness, and how to anchor the yo-yo to the floor of a structure being worked on (414-17). Acevedo denied receiving the training outlined in the orientation document and its accompanying illustration (413-14, 416-17), and claimed the signature on the attendance document, while his, was a sham unrelated to actual training (414). He denied that Ramirez ever trained him on how to attach a harness to a scaffold (415). Stevenson, on the other hand, testified that AMS indeed had trained him on fall

protection at Westshore (130). He confirmed his signature on the pertinent attendance form, and admitted that he "possibly" had received the orientation document (130, 151-52; G.C.Exh.2(c)). While Stevenson claimed that his training was "all verbal and show-and-tell," he admitted the Company's fall protection rule and the safety basis behind it, specifically recalled the use of the phrase "zero tolerance," and conceded that he had been taught various ways not to tie off (133-34, 149-50). Like Acevedo, however, he alleged that tying off to a scaffold was unsafe, and further alleged that he was told by AMS not to do it (135-36).

a. The General Counsel's Evidence Does Not Suffice to Establish Animus, and the General Counsel Therefore Cannot Prove a Prima Facie Case

AMS does not dispute that Acevedo's and Stevenson's terminations took place after the Union filed a representation-certification petition, and during the pre-election period. Further, AMS does not dispute knowing that Acevedo was a Union member; Acevedo disclosed this fact to the Company when he sought to be hired, and was hired. Finally, AMS admits that, during the pre-election period, it attempted to persuade employees to vote "no," as it had the legal right to do (G.C.Exhs.7(a)-(m)). These items collectively do not demonstrate animus which would allow for an inference that AMS terminated Acevedo for Section 7 activities, and fired Stevenson to camouflage this intention. See Filene's Basement Store, 299 N.L.R.B. 183, 220 (1990) (in an 8(a)(3) case, an employer's expression of opposition to a union "does not automatically establish that it discharged [the employee] with a discriminatory motive").

It is not an exaggeration to say that the record in this case is replete with evidence that the Company's relationship with the Union and its representatives was long-lasting, cooperative, and characterized by extensive goodwill, as would be expected with an employer with many supervisors who are, or were, Union members. Union members, including Bontempo, worked at

AMS without incident (253), and continue to do so; with reasonable limits also applicable to other persons and entities, AMS has allowed, and still allows, the Union's representatives to access jobsites to meet with employees, where the representatives distribute information, and sign up masons and supervisors as new members (310-11, 339-40). Even Bontempo admitted on cross-examination that several AMS foremen supported the Union (345), that the owners of the Company had been "nothing but decent" with him (364), and that the parties, at least when AMS hired masons under the terms of the memoranda of understanding, had a "very positive" relationship (260). And Bontempo agreed that Ron Karp was open to executing a collective bargaining agreement with the Union, if the terms were acceptable to the Company (259).

When all facts and circumstances are considered, the General Counsel failed to make a required showing of animus, meaning that it failed to establish a prima facie case and the 8(a)(3) claim therefore must be dismissed. See Detroit Newspaper Agency, 350 N.L.R.B. 352, 353 (2007) (dismissing complaint because "in view of the court's rejection of the grounds upon which the Board relied in finding animus, we concluded that the General Counsel failed to establish a prima facie case"); John J. Hudson, Inc., 275 N.L.R.B. 874, 874-75 (1985) (dismissing 8(a)(3) allegations because, without evidence of union animus, "the General Counsel has failed to meet her burden of establishing a prima facie showing to support an inference that the employee's protected activities were motivating factors" in a layoff decision).

b. The Company Proved its Wright Line defense

At the hearing, AMS proved that, regardless of Acevedo's Union membership and alleged activity, it would have fired both he and Stevenson for their safety violation. The Company introduced evidence of its zero tolerance policy, both in writing and in practice, for witnessed fall protection violations. It also introduced evidence of the thorough training provided to employees

on the rule, and of the resources available to employees for compliance, including equipment, and showed that the employment consequences of a violation were communicated and known. The Union's witnesses acknowledged that one important purpose of the fall protection rule is to prevent death or serious injury to employees (248). The Union's witnesses did not dispute the parameters of the rule, either, as they conceded that a harness was not necessary when an employee's work situation protected him from a fall (246-47). AMS next introduced documents and testimony from several witnesses showing instances where AMS employees, besides Acevedo and Stevenson, had been terminated for violating the rule, before the filing of the representation-certification petition and the union campaign that followed. Having demonstrated that its safety rule was consistently and evenly applied, then, AMS made an evidentiary showing sufficient to establish a Wright Line defense. See DHL Express USA, Inc., 360 N.L.R.B. 730, 736 (2014) ("]i]n order to meet the Wright Line burden, an employer must establish that it has consistently and evenly applied its disciplinary rules"); Contempora Fabrics, Inc., 344 N.L.R.B. 851, 852 (2005) (dismissing 8(a)(3) allegation after employer showed that its discipline "rested upon a consistently enforced policy"); see generally Northport Health Servs., Inc. v. N.L.R.B., 961 F.2d 1547, 1550 (11th Cir. 1992).

The General Counsel did not show the Company's evidence to be pretextual, or otherwise successfully contest it. Certainly, the General Counsel identified numerous alleged comparators to Acevedo and Stevenson, in the form of employees who had received a suspension, warnings, or no discipline at all. But each purported comparator is easily distinguishable, including some whose situations did not involve fall protection at all, meaning that the essence of the Amended Complaint's 8(a)(3) claim—stricter enforcement of rules—was not proven:

- Richard Haser. The General Counsel introduced a construction log entry, dated February 29, 2016, indicating that Haser was sent home for an alleged fall protection violation observed by a Hensel-Phelps employee named Sean Gentry (31; G.C.Exh.3). Hensel-Phelps was the general contractor at Bethune (49-50).

Feliz had no knowledge of anyone at AMS observing Haser in violation of the Company's fall protection rules (96-97).

- Tim Bryant. On March 8, 2016, Bryant, a mason, was witnessed by Ramirez—and by Acevedo—at Westshore in violation of the Company's fall protection rule. More specifically, Bryant was observed laying block on a leading edge while atop a six-foot scaffold on the second story of a building, about eighteen feet above the ground, without being tied off (33-34, 102-03, 545-47; G.C.Exh.4(a)-(c)). Like Acevedo and Stevenson, Bryant was sent home for the day pending a decision on his continued employment, and he signed a conforming Employee Warning Notice (547). When preparing Bryant's Notice, however, Ramirez accidentally marked "dismissal" before a decision had been made (32-33, 547-48; G.C.Exh.4(a)). This led Feliz, when he saw the document, to believe that Bryant had been dismissed (920-21). Additionally, Bryant's foreman, Hale, was travelling off-site periodically for doctor's appointments for a broken foot, and was not aware that a fall protection violation had occurred (788-89, 923-24). Bryant continued to come to work after March 8, 2016, as if nothing had happened, and Hale eventually dismissed him for insubordination on April 19, 2016 (33, 789; G.C.Exh.4(b)). Upon seeing that Bryant, somehow, had returned to work, only to be fired, Feliz directed on April 19, 2016, that Bryant was not eligible for rehire by reason of the fall protection violation, and a corresponding sticker was placed in Bryant's file (102, 922-23; Exh. G.C.4(b))

- Michael Mosely. On November 19, 2015, Mosely failed a post-accident drug test. AMS terminated him (35-36, 103; G.C.Exh.15(a)-(b)).

- Nova Hollingsworth. October 22, 2015, Hollingsworth failed a post-accident drug test. AMS terminated him as well. (36, 903-04; G.C.Exh.16).

- Wayman Sanders. On November 3, 2016, Sanders failed a drug test following an accident involving the forklift he was operating. AMS terminated him (37-38; G.C.Exh.17).

- Omar Walker. On July 11, 2016, Walker was given a written warning after a near-miss incident involving the forklift he was operating (38, 551-52; G.C.Exh.18). The episode, while a safety violation, was not "zero tolerance," and had nothing to do with fall protection (552, 554)

- Lulio Salgado. On August 9, 2016, Ramirez terminated Salgado for an insubordinate response after Ramirez tried to correct him for cutting rebar without a face shield (39-41, 553-54; G.C.Exh.19(a)-(c)). This episode, too, had nothing to do with fall protection (554).

- Brandon Carollo. On or about February 9, 2016, Carollo, a tender, was terminated for a fall protection violation at the Bethune jobsite witnessed by McNett (82-83;

> G.C.Exh.8(a)). Carollo had been working at an elevation of at least seven feet, with his safety harness lying on top of some bricks, and McNett proceeded to terminate him (85-86, 638-39). Prior to his termination, Carollo had been cited twice by Hensel-Phelps, on June 24, 2015, and August 20, 2015, for a failure to use fall protection (49-50, 542-53, 898-99; G.C.Exhs.8(d)-(e)). Neither violation was witnessed by AMS, although Ramirez summarized the June 24 violation—as the contractor dictated it to him—and signed the corresponding notice (81-83, 542-43, 571-72, 899). The Company acceded to the discipline demanded by the general contractor: for the alleged June 24 violation, a two-day suspension; for the alleged August 20 violation, a three-day suspension and a mandatory repeat of the contractor's safety orientation program (49-50, 543-44, 703, 899-900; G.C.Exhs. 8(d)-(e)). If a representative of the general contractor raises a safety concern about an AMS employee, including a fall protection incident witnessed by the contractor but not AMS, the Company's practice is to follow the contractor's disciplinary recommendation (80-81, 532-33, 544).

The Union, too, tried to prove the existence of comparators who had received lesser discipline. It failed. Bontempo blithely claimed that employees found not wearing a harness are let off with a verbal warning "all the time" on AMS jobsites, but when asked for specifics, he couldn't name anyone (323-24). Continuing, Bontempo had no firsthand knowledge about Bryant, Haser or Carollo—the three fall protection situations identified by the General Counsel among the eight alleged comparators—and had no information to dispute that AMS had not witnessed the alleged violations of Haser and Carollo alleged by Hensel-Phelps (327-30). Acevedo claimed that Ramirez swept Bryant's fall protection violation under the rug, craftily telling Acevedo "don't say anything," but that allegation is completely inconsistent with Ramirez's open demeanor at the hearing (433-34). And finally, the Union had no answer for the facts that (i) Acevedo and Stevenson, one Union and the other non-Union, were disciplined for the same thing on the same day in the exact same factual circumstances, thus demonstrating consistent rule enforcement, and (ii) if any employee at AMS got off with a warning and received a second chance after a fall protection violation, it was Acevedo and Stevenson. To wit, after Morales informed McNett at UT on May 16, 2016, that the two masons were at elevation and not wearing harnesses, McNett

directed Morales to make sure they got tied off properly, and to "tell them it's a good thing I didn't catch them."

AMS last notes that no evidence whatsoever, whether direct or circumstantial, was put on by the Union, or the General Counsel, supporting the theory that Stevenson was terminated to hide anti-Union animus towards Acevedo. In sum, because the General Counsel did not overcome the Company's Wright Line showing, the Amended Complaint's 8(a)(3) claim must be dismissed for this reason as well.

c. Credibility Determinations Favor AMS

Once again, on the 8(a)(3) claim, credibility determinations favor the Company. The Administrative Law Judge had the opportunity over a week-long hearing to observe the demeanor of every witness, and to make an informed judgment as to whose account of events was more believable. The testimony of AMS's witnesses generally was consistent. The testimony of Acevedo and Stevenson—who together were present at nearly all of the interactions germane to the 8(a)(3) claim, ranging from the training at Westshore to the toolbox talk and work at UT to the disciplinary sequence that followed—was not. Ramirez was extremely detailed and earnest in his testimony, and displayed an excellent memory; McNett, Morales and Feliz were calm and specific as to facts; Acevedo was taciturn, and Stevenson was unenthusiastic.[9] Stevenson's recollection also was vague, to the point where, when asked by the General Counsel whether he recalled May 16, 2016—his last day of work at AMS, and the date of the events leading to his discharge—he stated that he did not (137). Significantly, Acevedo's account of events diverged on material points from that of every other witness, and he continued to deny his fall protection training,

[9] In particular, Acevedo's portrayal of McNett as a screamer was not consistent with McNett's hearing demeanor, or how McNett described his own long-fuse supervisory style (605).

notwithstanding his signature on the sign-in sheet memorializing attendance at the orientation. Acevedo did, however, concede some key facts: while he did not realize it during his testimony, the way he tied off at UT allowed for the possibility of an impact in the event of a fall (418-22, 625-26), and he admitted that other masons working inside at UT had tied off to their scaffolds in a different manner (424-25).

With respect to Acevedo, the evidence also revealed his close collaboration with Bontempo, his bias, and his propensity to wrongfully accuse AMS of illegality. Specifically, Bontempo signed Acevedo up for the Union at Westshore (398-99; G.C.Exh.13). Bontempo gave Acevedo a Union t-shirt at UT, and brought him a Union health plan application (402-04). Acevedo spoke to Bontempo during his jobsite visits, and called Bontempo after his termination (191, 434-35, 446-47). Acevedo campaigned for the Union after his dismissal, telephoning Spanish-speaking masons (445-46). And in the same 2015 letter in which he asked AMS for work, Acevedo repeatedly falsely accused AMS of disability discrimination. First, he claimed that Feliz unlawfully refused to contact him for a possible job at AMS in 2014 due to his prior injuries (454; R.Exh.22). He then alleged that, when an AMS foreman allegedly had hired him on the spot at a jobsite in 2014, the Company had dismissed him by reason of those injuries once Feliz visited the site and saw him working (id.). Acevedo finally added that, in 2015, Feliz lied and told Acevedo that no jobs were available, because Feliz perceived Acevedo to be disabled (id.). All of the allegations in the letter were completely untrue. When Feliz called Acevedo on July 30, 2015, to refute the allegations, Acevedo revealed the source of his claims: he asserted that Union rep Mike Bontempo had told him that AMS did not want to hire him due to his injuries (454; R.Exh.23).[10]

[10] Bontempo denied telling Acevedo this. Strikingly, Bontempo, too, questioned Acevedo's truthfulness, claiming in an August 2015 e-mail to Feliz that he "would be happy to testify under oath in a court of law" that it was Acevedo, not him, who concluded that AMS was not considering

Of course, as set forth infra, Feliz went on to hire Acevedo for the Company's job at Westshore. Simply put, when deciding the 8(a)(3) claim, the Administrative Law Judge should credit AMS's witnesses, and discredit the General Counsel's.

B. The Union's Objections to the Election are not Well-Taken

The Union filed Post-Election Objections with the Board on June 16, 2016, in which it objected to the election on ten grounds, three of which subsequently were withdrawn and seven of which were a subject of the administrative hearing (11; R.D.Exhs.1(f) & (k)). Four of the seven surviving objections heard by the Administrative Law Judge duplicated the allegations of the Amended Complaint—that AMS terminated an employee, Acevedo, in response to his Union activities (R.D.Exh.1(f), at ¶ 1); that AMS coerced its employees through stricter enforcement of its work rules (id. at ¶ 2); that the Company interrogated employees about their Union activities and sentiments (id. at ¶ 3); and that AMS threatened employees that their wages would decrease if the Union prevailed in the election (id. at ¶ 8).[11] The remaining objections consisted of the Union's two exceptions to AMS's Excelsior list, which the Union characterized as "irregularities" that disenfranchised voters and prejudiced the Union in its efforts to communicate with them (R.D.Exh.1(f), at ¶¶ 4-5). More specifically, the Union asserted that (i) the list was inaccurate and

Acevedo due to his injuries, and that he had not made any such statement to Acevedo (347-49; R.Exh.56).

[11] The Union and the General Counsel introduced evidence relating to the truth of the representations made in the Company's campaign materials (179-80, 691-92; G.C.Exh.7(c), (j) & (k)). But the Union conceded that the content of the materials was only to show animus with respect to the discharges of Acevedo and Stevenson, and was not a basis for its objections to the election (693-95). It long has been held that, as long as no promise of benefit or threat of reprisal is made, an employer's pre-election communications are governed by the principle of free speech, with the Board not concerning itself with truth or falsity. N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 617 (1969); Midland Nat. Life Ins., 263 N.L.R.B. 127 (1982). And the Union admitted that at least some of the contents of the materials was true: that Florida is a right-to-work state; that employees might have hundreds of dollars in Union dues deducted from their pay; and that Union dues go, at least in part, to pay the salaries of Union executives (256-57, 321-22).

incomplete, as it omitted eligible voters and provided incorrect addresses; and (ii) AMS was allowed to include an additional employee on the list, after the deadline for providing it, which "raise[d] suspicion of the reliability of the Excelsior list" (id.). The Union's last objection asserted that AMS discriminatorily applied its solicitation policy to the Union (id. at ¶ 9). As a remedy for the Company's alleged objectionable conduct, the Union asked that the Board set aside the election, and order a new election (id. at 1, 5).

The party seeking to overturn a Board election bears the burden of proving that unlawful conduct of the other party interfered with the results. Safeway, Inc., 338 N.L.R.B. 525, 525-26 (2002). The Board has described the burden as a heavy one, as Board elections are not lightly set aside. Id. "There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." Quest International, 338 N.L.R.B. 856, 857 (2003). Simply stated, an election will not be set aside unless it is proven that objectionable conduct reasonably tended to interfere with the employees' free and uncoerced choice. See, e.g., Quest International, 338 N.L.R.B. at 857; Taylor Wharton Div., 336 N.L.R.B. 157, 158 (2001).

1. AMS Submitted an Acceptable Excelsior List, and Properly Sought to Update It

As described supra in Part II(D)(1), prior to the election, AMS prepared its Excelsior list of eligible voters under the Steiny-Daniel formula, using names and contact information contained in its human resources software and hard-copy personnel files. Under the Board's revised election rules, which require an employer to provide an Excelsior list within two days of the Regional Director's approval of a stipulated election agreement, see 29 C.F.R. § 102.62(d), the Company provided the list to the Board, copying the Union, on May 10, 2016 (876-77; C.P.Exh.2). AMS filed an amended list, and/or updated the names of eligible voters, over the following two weeks, once again contemporaneously copying the Union (C.P.Exhs.3-6). When the intention was for a

voter to be excluded, AMS specifically identified the reason why under the Steiny-Daniel exclusion criteria, which direct that an employee discharged for cause, or who quit before the completion of the last job on which he was employed, is ineligible to vote (C.P. Exhs.5-6). Metfab, Inc., 344 N.L.R.B. 215, 221-22 (2005); see generally Steiny & Co., 308 N.L.R.B. 1323 (1992); Daniel Constr. Co., 133 N.L.R.B. 264 (1961). Ron Karp, who transmitted the lists and updates to AMS counsel for filing, understood that the Company needed to provide employees' names and last known addresses, and information in the Company's possession on how the employees could be contacted (877-78).[12]

The Union reviewed the Excelsior list, and the updates, and compared them to its own records, including fringe benefit reporting forms sent by AMS listing employee hours during the reporting period (195, 198-99). The Union communicated with the Board and AMS, submitting the names of employees it believed were both eligible and omitted, along with corrected addresses and phone numbers, and requesting additional and replacement ballots, as appropriate (192-209, 219-24; C.P.Exhs.2-13, 22-23).

Nothing about the above sequence is a basis on which to set aside the election. Most importantly, as a matter of law, an employer has no duty to include on its Excelsior list the names of those persons ineligible under the Steiny-Daniel formula. An Excelsior list is a list of eligible voters, not all employees. If AMS located the names of masons terminated for cause, or who voluntarily quit prior to the conclusion of their last job, it was entitled to exclude, or attempt to exclude, those persons. Excelsior Underwear Inc., 156 N.L.R.B. 1236, 1239-40 (1966) ("The employer must file with the Regional Director an election eligibility list, containing the names and

[12] As several of the voters identified as ineligible on AMS's updates voted, and had their ballots challenged by AMS (for instance, Barlow, Clark, Greenlee, Hickey and Smith), it appears that the Board disregarded the Company's updates.

addresses of all the eligible voters. The Regional Director, in turn, shall make this information available to all parties in the case") (emphasis added). Nor was there any evidence that AMS intentionally omitted from the list names and contact information for eligible voters, or was negligent in its preparation of the list, meaning that the Union's "suspicion" as to the reliability of the list was not confirmed. If the Union's argument is that an employer has an obligation beyond providing the best available names, addresses, and other contact information in its records, that argument is simply wrong. See American Biomed Ambulette, Inc., 325 N.L.R.B. 911 (1998); see also Singer Co., 175 N.L.R.B. 211, 212 (1969) ("It is not alleged, nor does the record indicate, that the Employer provided the Petitioner with addresses which were less accurate than it used for its own purposes … the original Excelsior list provided information comparable to that available to, and utilized by, the Employer"). The Board itself, in its Election Procedures guidelines, stresses that an employer only need provide "available" employee contact data in its possession. 29 C.F.R. § 102.62(d). Last, nothing prohibits either party from attempting to update an Excelsior list so that every eligible voter is sent a ballot. Employees and former employees move, and contact information becomes outdated. Even Bontempo conceded that addresses of members in the Union's own records periodically needed updating (341-42).

2. AMS Did Not Discriminate in the Application of Its Non-Solicitation Policy

The Union's objections assert that AMS enforced its solicitation policy in a discriminatory manner. In support, the Union at the hearing called Bontempo, who proceeded to characterize identically nearly every interaction at the Company's jobsites following the posting of the election Notices: he claimed that, after previously being welcomed, and even invited, by individual foremen, and allowed completely free reign on various jobsites by AMS—to include talking to employees in restricted-access construction sites while the employees were working on dangerous

and time-sensitive tasks—he suddenly was limited. He either was restricted to non-working parts of the day, or allegedly told that he was no longer welcome at any time (210-15, 266). Bontempo added that AMS foremen McNett, Canfield and Hale, and Operations Manager Carney, following the Union's filing of the representation-certification petition, radically changed their attitudes towards the Union, with each becoming condescending and/or claiming that the Union was "stealing money" from members (368-73, 385-86). These allegations uniformly were denied by the pertinent foremen and Carney, who along with McNett and Morales knew Bontempo well enough to have his telephone number (647, 821-22).

Notably, AMS's alleged hostility did not extend to Bontempo's organizing activities immediately beforehand. In an April 23, 2016, written weekly report of his organizing activities, e-mailed to the Union president just before the representation-certification petition was filed, Bontempo described gathering authorization cards. He did not report that he, or Union supporters among the AMS workforce, were experiencing any impediment or condescension at all. Rather, Bontempo wrote that AMS foremen, including McNett and Canfield, were supportive and/or interesting in joining the Union themselves (335-38, 342; R.Exh.58). And Bontempo undisputedly was able to secure sufficient authorization cards from his jobsite visits to amount to a showing of interest for purposes of initiating Board election proceedings (310, 382, 388-89).

Bontempo's hearing testimony on this subject consisted of accounts of his post-Notice jobsite visits which were very different from what the Company's witnesses recounted. Bontempo absolutely denied ever interrupting masons on the job (267), but admitted that he had arrived at the jobsites on at least some occasions when employees were working. Specifically:

- Upon Bontempo's May 10, 2016, arrival at the UT jobsite with Union representative Marvin Monge, McNett allegedly directed him to take a photo of the posted Notice of Election, and then told him to leave (211, 272-73, 280). Carney concurred, saying that Bontempo was no longer welcome to visit that jobsite "but

could visit during break, lunch or quitting time" (211-12, 261-62). When Bontempo said "you've always let me talk to them [employees] before," either Carney or McNett answered "at lunch time or break time, I've never questioned it" (274-75). Bontempo conceded that he and Monge "could" have talked to the masons that day as they were leaving the job, but for the fact that they allegedly were leaving via different entrance (271-72). Bontempo also conceded that neither he nor Monge returned to the parking lot to try to talk with any masons who might be returning to cars parked there (272-73). Instead, both Bontempo and Monge chose to stay and have a conversation with McNett and Carney, which ended after all the employees had departed (271-75). The conversation with the supervisors not only addressed their Union insurance, but also allegedly concerned hours not reported to the Union by AMS for McNett's benefit purposes, which Bontempo investigated and confirmed, but did not try to rectify with AMS (277-78).

- Also on May 10, Bontempo claimed that, when he visited the Westshore jobsite with Monge, foreman Coy Hale emphatically told him that he was no longer welcome on his jobsites at any time and would have to leave (212-13, 279). Bontempo conceded, however, that he had arrived between 9:00 a.m. and noon and when employees were working (279-80).

- On May 24, 2016, Bontempo and Union organizers Keith Hocevar and Ernest Adame visited the Holiday Inn Express jobsite, where Canfield purportedly informed them, again emphatically, that the Union was no longer welcome on the jobsites or even in the parking lots "at any time, period," including after hours (214-15, 286-88).

- When Bontempo visited another jobsite, some condominiums at St. Petersburg, Canfield's alleged "straw boss," a man named Johnny Wheeler, purportedly told Bontempo that he should "kn[o]w better," and that he was no longer welcome there (215-16). Bontempo testified that no employees were present at the time, other than Wheeler himself, such that Bontempo was not really prevented from speaking to anyone (302-03).

The Administrative Law Judge at the hearing was keenly interested in the Company's treatment of food trucks arriving at its jobsites, as the Union asserted that AMS discriminatorily allowed food truck personnel to solicit employees during work time while the Union's representatives were not allowed this privilege. The Union identified no other third-party solicitation. AMS witnesses were consistent that the trucks did not enter the jobsites and/or solicit AMS employees during their working time, and that the site general contractor also would have

had to consent to the trucks' entry (750-51, 757-58, 785, 819, 843).[13] And the Union had no evidence to back up its claim. The access identified by Union witnesses was consistent, not inconsistent, with the Company's policy—Bontempo and Pearson claimed that the food trucks catering to employees stopped in jobsite parking lots at break and during lunchtime (218-19, 508-10). Bontempo did not have any specific recollection of ever seeing a food truck at UT following the Union's filing of the representation-certification petition (282-83). He also conceded not knowing whether food trucks were allowed to be on-site at Westshore after the election petition was filed (282).

As with each of the claims in the Amended Complaint, witness credibility is crucial to the resolution of the Union's allegation of disparate policy enforcement. AMS witnesses were unvarying in their description and application of the Company's policy regarding third-party jobsite access to employees. They uniformly stressed that safety and production concerns, and general contractor requirements, meant that contact was restricted to before and after work, and during breaks and lunch, and limited to persons and entities who had complied with the general contractor's access prerequisites. In this, the policy unquestionably was legal under the Act. See generally Lechmere, Inc. v. N.L.R.B., 502 U.S. 527 (1992).

While the Union did not admit this, there is evidence in the record that Bontempo's motive was strategic, and that he sought to drum up contrived grounds for challenging the election in the event the Union suffered a defeat, and/or burden AMS with the expense of defending Board proceedings. Curiously, while Bontempo called Morales prior to coming to the UT jobsite to

[13] The trucks were itinerant. So that employees who had not brought their own food might have a chance to eat, Morales testified that, on jobsites where he was the foreman, he sometimes would accelerate or push back a scheduled morning break, or declare that a break would begin when the food truck sounded its horn, so that the break would coincide with the truck's presence (758).

distribute shirts and Gatorade, and waited until the end of the work day to do it, he did not call any other AMS foreman, or Carney, before visiting their jobsites, which he often did during work time. Bontempo, too, cleverly finessed his description of AMS's policy, which he himself had helped create. He conceded that he reached an agreement with Carney regarding his jobsite access, but diminished it, describing it not as an agreement, but merely a gesture of good faith which he proposed "out of respect" for the Company and its ownership (262-63). According to Bontempo, he simply told Carney that he would "try" to limit his access to break or lunch periods, and before or after work (id.). Thereafter, he then used his "best ability" not to come on jobsites while the men were working (343-44).

AMS witnesses denied Bontempo's claims against them. The surrounding circumstances corroborated the denials, as they did not demonstrate that the Company's foremen, or Carney, possessed any kind of hostility towards Bontempo personally or the Union in general when Bontempo came on-site. Hale, for example, was comfortable enough with Bontempo to contact him when he did not promptly receive his Union card or insurance enrollment information (782-84, 798-800). And Canfield confirmed that he had, during one of Bontempo's visits, asked Bontempo for information, because he was interested in joining the Union (724). Bontempo was not as engaging, despite his alleged respect for the Company and its ownership. After the election, he attempted to lure masons away from AMS, preparing and disseminating a flyer to that effect on Union letterhead, with his name and telephone number on it (352-56; R.Exh.41). The flyer offered masons a $1,000.00 bonus "after 30 Days of employment with a Union Masonry Contractor in Tampa and surrounding areas" (352-56; R.Exh.41).

Last, Bontempo exuded guile during his testimony; the Company's witnesses did not. No AMS witness was impeached convincingly at any time during the hearing. On the other hand,

Bontempo—a convicted felon who admitted to lying to AMS—was discredited comprehensively, impeached over a dozen times on various subjects:

- At the hearing, Bontempo aggressively claimed that a mason's competency could be determined within hours of his first day of work (1017). This contradicted one of his affidavits, in which he stated that such a determination took place "within days" (1029).

- After testifying that he had the authority to hire masons without checking with upper management, Bontempo conceded on cross-examination that the masons had to fill out applications, which AMS management, not Bontempo, then reviewed, with the ability to deny employment (238-39).

- After testifying that he'd dismissed employees while at AMS, Bontempo at first could not name a single employee that he terminated (240-41). He later only recalled a single instance, a laborer allegedly let go for poor workmanship (300-01).

- After he testified that "keeping an eye on safety" at projects was one of his AMS responsibilities as a foreman, Bontempo denied ever being provided, or trained, on any Company safety policy, and claimed that Feliz and Carney had assumed he knew his safety role (242-46).

- Bontempo testified that he met with AMS principal Ron Karp personally on several occasions in 2015-16, for an average of two hours each time (259), and that he had Ron Karp's e-mail address and telephone numbers, which he used to communicate with Ron Karp. Bontempo added that he had a fairly good working relationship with Ron Karp. Yet when AMS foremen and Carney allegedly excluded him from AMS jobsites following the filing of the representation-certification petition, he inexplicably did not contact Ron Karp, claiming that this wasn't his normal protocol (260-61).

- Bontempo testified at the hearing that he had no recollection of AMS ever paying a foreman a bonus upon the successful completion of a job. This testimony directly contradicted his affidavit, a discrepancy Bontempo tried to explain by saying that he had been told by Carney that AMS paid bonuses (265-66).

- Regarding his agreement with Carney, Bontempo testified that his respect stemmed from the fact that he knew what it was like to "run jobs and be interrupted in the production" (262-63). In an earlier affidavit, Bontempo conceded that AMS management held foremen accountable when a job was not proceeding on schedule (264-65). Notwithstanding the consequences, Bontempo claimed at the hearing, nonetheless, that he could not recall ever being told by anyone not to interrupt the working men on a job (267).

- Bontempo inconsistently described his interaction at UT with McNett. At the hearing, Bontempo first said that McNett simply asked him to leave; next, he embellished the

testimony, claiming McNett told him that he no longer would have access to the jobsite (211, 269-71).

- At the hearing, Bontempo alleged that Carney possessed animus towards the Union. Bontempo earlier asserted in an affidavit that Carney had told him that he feigned opposition to the Union, and actually supported the Union (386-88, 1031-33).

- Bontempo significantly deviated from his affidavit when recounting his interaction with Hale. In his affidavit, their alleged conversation was much less animated, with Bontempo quoting Hale as referring to the agreement with Carney and saying "What are you doing here? You know you can't be here" (291-92). Bontempo admitted at the hearing that, if Hale felt he was interrupting the men's work, it was Hale's prerogative to say that (291).

- Bontempo did not refer to Johnny Wheeler as Hale's straw boss in an affidavit given to the Board, or mention that there were no employees on the jobsite that day (303-05). He also had no knowledge of whether anyone else was allowed to access the site, which was surrounded by a fence, with access limited by the general contractor (305-06). Canfield denied that Wheeler was his straw boss, or that Wheeler had any authority to discipline or discharge employees, or to run a jobsite (727, 732-33).

- At the hearing, Bontempo alleged that Canfield wanted to join the Union, but declined to join because he feared for his job. No such allegation appeared in Bontempo's affidavits, which contained detailed descriptions of Bontempo's purported interactions with Canfield (372, 388). Canfield testified that he demurred in joining, believing that he did not have enough information to make a decision (724-25).

- Bontempo did not deny that a representative of Hensel Phelps had escorted him off the jobsite at Bethune because he had not attended the contractor's mandatory orientation (382-84, 820-21). He attempted to blame this on Dutton, who allegedly told Hensel-Phelps with anti-Union animus that Bontempo was not welcome on the jobsite (383-84). The Union, however, did not file any unfair labor practice after the expulsion (id.).

In sum, the Administrative Law Judge must not sustain this objection. The Union did not prove it, as the totality of the record demonstrates that AMS did not enforce a solicitation policy in a discriminatory way against the Union. There is, moreover, no evidence that the alleged objectionable conduct of AMS reasonably tended to interfere with employees' free choice.

C. The Employer's Ballot Challenges Should Be Sustained

AMS challenged the ballots of nine individuals who quit the Bethune job before it concluded in June 2016: Robert Baker, Jacob Barlow, Jeremy Clark, Mark France, Forest

Greenlee, Dustin Hickey, Robert Pietsch, George Reed, and David Wrench. The Company also challenged the ballots of Acevedo and Stevenson, plus Robert Harvey, Raymond Pearson, and John Smith, as employees terminated for cause. The Regional Director secured the ballots, pending resolution of the challenges, which it determined raised substantial and material factual issues (R.D.Exh.1(e) & 1(m)). The legal basis for the challenges, that the fourteen employees were ineligible to vote under the Steiny-Daniel formula, was the same as the Company's basis for excluding the employees from the Excelsior list. As the challenging party, AMS has the burden of proving that the ballots were cast by individuals not eligible to vote. Sweetener Supply Corp., 349 N.L.R.B. 1122, 1122-23 (2007); Angotti Healthcare Sys., Inc., 346 N.L.R.B. 1311, 1311 n.3 (2006).

Importantly, with respect to employees terminated for cause, or quitting before their jobs are completed, the Steiny-Daniel formula does not take into consideration whether employees dismissed for that reason, or who resign at that particular juncture, have a reasonable expectation of recall. The argument to the contrary was a prominent feature of the Union's case, with the Union presenting testimony that AMS regularly placed laid-off employees "on the couch," a euphemistic expression meaning that the Company laid off employees pending their recall for another project days or months later (188-89, 707-14, 829, 907, 999-1000, 1018-19; C.P.Exhs.26(a)-(e)). As a factual matter, none of the resignations in this case involved an employee being placed "on the couch," but the contention is a red herring regardless. The specific holding of Steiny and Daniel is that a construction industry employee terminated for cause, or who quits prior to the completion of his or her last job, does not have a reasonable expectation of recall as a matter of law. For example, in Daniel, the Board held as follows:

> In our opinion, the Board's original formula will assure that those employees who have a reasonable expectation of future employment with the Employer, and

> thereby have a continuing interest in the Employer's working conditions will be eligible to vote. At the same time, however, we are not unmindful that the standard or formula applied must not be so broad in application that it will permit individuals who have no likelihood of future employment with the Employer to decide the question whether the employees will have representation. For this reason, we think that the desired result can be achieved by excluding those individuals who have quit voluntarily or have been terminated for cause prior to the completion of the last job for which they were employed.

Daniel Constr. Co., 167 N.L.R.B. 1078, 1081 (1967); see also Steiny and Co., Inc., 308 N.L.R.B. 1323, 1326 (1992). In other words, it is irrelevant whether the masons who quit the in-progress Bethune job, or the terminated masons, expected to be rehired in the future. Nor would it be relevant that any mason at Bethune quit because he perceived the job to be winding down.

1. The Nine Masons Who Quit Bethune Were Ineligible to Vote

AMS presented uncontested evidence on the duration of the Bethune job and the work performed there. The project began at the end of 2014; consisted of two distinct phases, with an April 8, 2016, due date for block and brick work; and entailed additional work after the due date which included completing the general contractor's punch-out list, and demobilizing the site. The Company maintained masons on the job all the way through the week ending June 19, 2016—indeed, the Bethune payroll contained at least twenty-three masons and exceeded $52,000.00 for the week ending April 3, 2016, and contained five masons and exceeded $7,500.00 for the week ending May 8, 2016—and transferred masons to other jobs afterwards. Of the nine masons challenged as voluntary quits, each resigned prior to the completion of the Bethune job, and therefore was ineligible to vote in the election: Wrench on January 15, 2016; Baker and France on February 11, 2016; Pietsche on March 18, 2016, Barlow and Hickey on April 1, 2016, Greenlee on April 2, 2016; Clark on April 4, 2016; and Reed on April 15, 2016. Three of the masons, Wrench, Pietsche and Reed, verbalized that they were taking other jobs, and a fourth mason, France, moved out-of-state. AMS put on corroborating testimony from Dutton, who managed

Phase I at Bethune, and McNett, who was in charge of Phase II and determined its labor needs, that neither foreman laid off any masons from Bethune through at least March 2016, and that the Company actually hired masons between phases. McNett also told Reed, his straw boss whose work he valued, that he wished to keep him employed at AMS beyond Bethune's completion, and informed Bontempo of this desire as well (1049-50, 1053-54).

Of the nine quitting masons, the Union provided testimony from only one, Wrench, who perfunctorily testified that he was laid off from Bethune by McNett, who allegedly was cutting the crew down, in January 2016 (988-89, 992). Wrench is a Union member and added that he was able to secure new employment a week later, on a job the Union referred him to (990-92). The Administrative Law Judge should not credit this testimony, not only because of the witness's bias, but because the testimony about being laid off is contradicted by the testimony of numerous witnesses and written documents. Moreover, Wrench impeached himself: on cross-examination, he conceded that, at the time of his alleged layoff, there were roughly forty masons remaining on-site, and that "there was still plenty of work to do" (991). Wrench also admitted that, as of that time, his brother was still employed by AMS at Bethune as a mason (id.).

One further Union argument quickly may be disposed of. Bontempo claimed that the Company, having paid to lodge masons working at Bethune, suddenly ceased this practice altogether, implying that this decision resulted in a constructive layoff of lodged employees who for geographic reasons were not able to return to the job, including France and Robert Harvey (1020-21). Even if true, this is, obviously, not the same as an actual layoff for Steiny-Daniel purposes. But Bontempo conceded that the Company still was looking for manpower at Bethune during this time (1021), and no witness adversely affected by AMS's alleged decision to stop paying for lodging testified at the hearing. In contrast, Feliz testified that, after Harvey's

termination, the Company still was hiring masons, moving them to Bethune, paying the employees per diem and putting them up in hotels (1058-59). When asked for an example, Feliz was able to provide names (1059-68; R.Exhs.61-62).

2. The Five Masons Terminated for Cause Were Ineligible to Vote

As set forth in Part II(B) of this Brief, AMS terminated Acevedo and Stevenson for cause, for violating the Company's rule on use of fall protection at elevation. It also terminated Bethune masons John Smith and Robert Harvey for cause—Smith for poor work performance, and Harvey for unacceptable attendance and not showing up to work on time. Specifically, McNett terminated Smith on January 15, 2016, after the Company had to tear down some of Smith's masonry work (655-56, 1057; R.Exh.32); McNett and Feliz terminated Harvey, who missed work while the Company was paying to lodge him in a local hotel, on October 9, 2015. AMS also terminated a fifth mason for cause, Raymond Pearson. Hale terminated Pearson for poor performance from Westshore on February 10, 2016 (781-82, 1019; R.Exh.31). He was building walls that had to be plumb, because a hollow-core slab was to rest on top of them (782, 796-97). The hollow-core cannot set properly on walls that are not straight and plumb, and in such an instance, the entire structural integrity of the building can be affected (797). Hale checked the masons' work at Westshore daily (798). He warned Pearson several times about the quality of his work, and Pearson confessed that he "wasn't very good on block" (782, 1012). Eventually, one of the walls Pearson built had to be taken down, because it was out of plumb, and Pearson was terminated as a result (782, 790).

To oppose AMS's for-cause challenges (besides Acevedo and Stevenson, the subject of the General Counsel's 8(a)(3) claim), the Union called only Smith and Pearson. Smith, a Union member, was subpoenaed to attend the hearing, and spoke with Bontempo before testifying (996-

97, 1007). He denied being fired for poor work performance, was unsure whether any of his masonry work needed to be taken down, and claimed that McNett laid him off from Bethune and told him to "go draw unemployment" (999-1000, 1003-04). According to Smith, other, unnamed employees allegedly were laid off too (999). Smith added that he could lay block but not brick, and claimed that the Bethune project was about to enter into a bricklaying phase (1004). Pearson, also a Union member (505), limited his testimony to claiming that the Company erred. He claimed that he was directed to fix another mason's poor work, rather than his own, and that he simply had failed to do the repair correctly (1012-15).

Neither of these accounts is credible. Like Wrench, Smith conceded that there were still numerous masons at the Bethune job at the time of his alleged layoff (1004). And the Company provided further evidence of why Smith was dismissed. Masons are proficient at different types of work, and Smith had trouble with four-inch block (1050-51). There was no dispute that, several weeks before the hearing, AMS, through Feliz, rehired Smith for a job in Orlando (1005-06, 1058). This job involved a different type of masonry work, laying eight-inch block, than the four-inch block Smith had struggled with at Bethune (1005-06, 1057-58). As for Pearson, also a Union member, his testimony was compromised substantially by his extremely poor memory of events. Not only could Pearson not remember how his employment at AMS ended, other than the basic fact that he was terminated (1009-11, 1014), but he qualified his account at various times with the words "uncertain" (505), "forget" (505), "maybe" (506), "not exactly sure" (506), "I really ain't sure" (1009), "I don't remember" (1009, 1012), "I guess" (1012), and "I don't think" (1012). Moreover, the Company's account was strengthened by unopposed testimony that the quality of Pearson's work had been a problem before. Dutton testified that, on Phase I at Bethune, he found Pearson's work "questionable, at times … we had to tear some of his work out" (1039-41). Dutton

and McNett eventually dismissed Pearson for poor work on Phase II at Bethune, but Pearson was able to continue employment with AMS by moving to Westshore after Bontempo intervened (1010-11, 1041-43). All of the masons terminated, then, indeed were terminated for cause, and the masons were not eligible to vote in the Union election.

IV. CONCLUSION

Because AMS did not violate Sections 8(a)(1) and (3) of the Act, both the Amended Complaint and the Union's objections to the Company's alleged pre-election conduct lack merit. And because AMS's ballot challenges are valid, the subject ballots must not be counted, meaning that the June 9, 2016, election result in favor of AMS must stand. AMS therefore respectfully requests that the Administrative Law Judge dismiss the Amended Complaint and the Union's objections, and enter an Order directing that the challenged ballots not be tallied, granting AMS such other and further relief as the Administrative Law Judge finds just and proper.

Dated this 31st day of March, 2017.

Respectfully submitted,

/s/ Charles J. Thomas

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that foregoing has been filed electronically with Administrative Law Judge Michael A. Rosas at michael.rosas@nlrb.gov, with two further copies mailed to Judge Rosas by overnight mail, and with additional copies furnished to the individuals below in the manner indicated, on this 31st day of March, 2017, as follows:

Caroline Leonard, Esq. (by hand delivery)
National Labor Relations Board, Region 12
201 East Kennedy Boulevard, Suite 530
Tampa, Florida 33602-5824

Margaret J. Diaz (by hand delivery)
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Attorney

CASE NO. 18-14163

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ADVANCED MASONRY ASSOCIATES, LLC
d/b/a Advanced Masonry Services

(Petitioner/Appellant)

vs.

NATIONAL LABOR RELATIONS BOARD

(Respondent/Appellee)

A Petition for Review of an Order of the National Labor Relations Board

N.L.R.B. Case No. 12-CA-22114

Tab No: 109

Form NLRB-4910
(4-2015)

United States of America
National Labor Relations Board

NOTICE OF ELECTION

INSTRUCTIONS TO EMPLOYEES VOTING BY U.S. MAIL

PURPOSE OF ELECTION: This election is to determine the representative, if any, desired by the eligible employees for purposes of collective bargaining with their employer. (See VOTING UNIT in this Notice of Election for description of eligible employees.) A majority of the valid ballots cast will determine the results of the election. Only one valid representation election may be held in a 12-month period.

SECRET BALLOT: The election will be by secret ballot carried out through the U.S. mail under the supervision of the Regional Director of the National Labor Relations Board (NLRB). A sample of the official ballot is shown on the next page of this Notice. Voters will be allowed to vote without interference, restraint, or coercion. Employees eligible to vote will receive in the mail *Instructions to Employees Voting by United States Mail*, a ballot, a blue envelope, and a yellow self-addressed envelope needing no postage.

ELIGIBILITY RULES: Employees eligible to vote are those described under the VOTING UNIT on the next page and include employees who did not work during the designated payroll period because they were ill or on vacation or temporarily laid off. Employees who have quit or been discharged for cause since the designated payroll period and who have not been rehired or reinstated prior to the date of this election are not eligible to vote.

CHALLENGE OF VOTERS: An agent of the Board or an authorized observer may question the eligibility of a voter. Such challenge must be made at the time the ballots are counted.

AUTHORIZED OBSERVERS: Each party may designate an equal number of observers, this number to be determined by the NLRB. These observers (a) act as checkers at the counting of ballots; (b) assist in identifying voters; (c) challenge voters and ballots; and (d) otherwise assist the NLRB.

METHOD AND DATE OF ELECTION

The election will be conducted by United States mail. The mail ballots will be mailed to employees employed in the appropriate collective-bargaining unit. At 4:30 p.m. on Wednesday, May 25, 2016, ballots will be mailed to voters from the National Labor Relations Board, Region 12, 201 E. Kennedy Blvd., Ste. 530, Tampa, FL 33602-5824. Voters must sign the outside of the envelope in which the ballot is returned. Any ballot received in an envelope that is not signed will be automatically void.

Those employees who believe that they are eligible to vote and did not receive a ballot in the mail by June 1, 2016, should communicate immediately with the National Labor Relations Board by either calling the Region 12 Office at (813)228-2641 or our national toll-free line at 1-866-667-NLRB (1-866-667-6572).

All ballots will be commingled and counted at the Region 12 Office on Thursday, June 9, 2016 at 10:00 a.m. at the National Labor Relations Board, Region 12, 201 E. Kennedy Blvd., Ste. 530, Tampa, Florida 33602. In order to be valid and counted, the returned ballots must be received in the Region 12 Office prior to the counting of the ballots.

Form NLRB-4910
(4-2015)

United States of America
National Labor Relations Board

NOTICE OF ELECTION

INSTRUCTIONS TO EMPLOYEES VOTING BY U.S. MAIL

VOTING UNIT

EMPLOYEES ELIGIBLE TO VOTE:

All bricklayers and/or masons employed by the Employer.

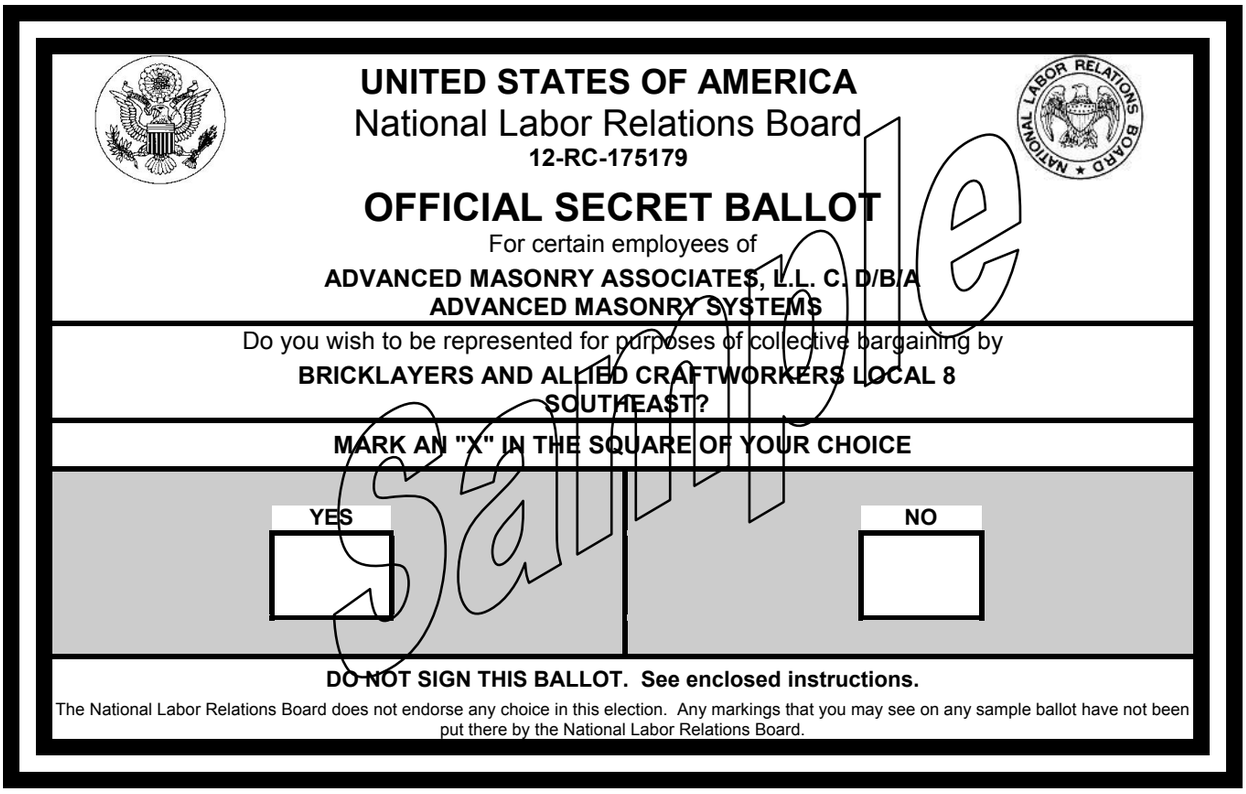
EMPLOYEES NOT ELIGIBLE TO VOTE:

All other employees, office and clerical employees, professional employees, guards and supervisors as defined in the Act.

NOTE:

Those eligible to vote in the election are employees in the above unit who were employed during the **payroll period ending April 29, 2016**, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off.

Also eligible to vote are all employees in the unit(s) who either (1) were employed a total of 30 working days or more within the 12 months preceding the election eligibility date or (2) had some employment in the 12 months preceding the election eligibility date and were employed 45 working days or more within the 24 months immediately preceding the election eligibility date. However, employees meeting either of those criteria who were terminated for cause or who quit voluntarily prior to the completion of the last job for which they were employed, are not eligible.



United States of America
National Labor Relations Board

NOTICE OF ELECTION

INSTRUCTIONS TO EMPLOYEES VOTING BY U.S. MAIL

RIGHTS OF EMPLOYEES - FEDERAL LAW GIVES YOU THE RIGHT TO:

- **Form, join, or assist a union**
- **Choose representatives to bargain with your employer on your behalf**
- **Act together with other employees for your benefit and protection**
- **Choose not to engage in any of these protected activities**
- **In a State where such agreements are permitted, the Union and Employer may enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the Union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the Union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustment).**

It is the responsibility of the National Labor Relations Board to protect employees in the exercise of these rights.

The Board wants all eligible voters to be fully informed about their rights under Federal law and wants both Employers and Unions to know what is expected of them when it holds an election.

If agents of either Unions or Employers interfere with your right to a free, fair, and honest election the election can be set aside by the Board. When appropriate, the Board provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with the rights of employees and may result in setting aside of the election:

- **Threatening loss of jobs or benefits by an Employer or a Union**
- **Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises**
- **An Employer firing employees to discourage or encourage union activity or a Union causing them to be fired to encourage union activity**
- **Making campaign speeches to assembled groups of employees on company time, where attendance is mandatory, within the 24-hour period before the polls for the election first open or the mail ballots are dispatched in a mail ballot election**
- **Incitement by either an Employer or a Union of racial or religious prejudice by inflammatory appeals**
- **Threatening physical force or violence to employees by a Union or an Employer to influence their votes**

The National Labor Relations Board protects your right to a free choice.

Improper conduct will not be permitted. All parties are expected to cooperate fully with this Agency in maintaining basic principles of a fair election as required by law.

Anyone with a question about the election may contact the NLRB Office at (813)228-2641 or visit the NLRB website www.nlrb.gov for assistance.

CASE NO. 18-14163

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ADVANCED MASONRY ASSOCIATES, LLC
d/b/a Advanced Masonry Services

(Petitioner/Appellant)

vs.

NATIONAL LABOR RELATIONS BOARD

(Respondent/Appellee)

A Petition for Review of an Order of the National Labor Relations Board

N.L.R.B. Case No. 12-CA-22114

Tab No: 110

Form NLRB-4910
(4-2015)

Estados Unidos de América
Junta Nacional de Relaciones del Trabajo

AVISO DE ELECCION

INSTRUCCIONES PARA LOS EMPLEADOS QUE VOTAN POR CORREO DE LOS ESTADOS UNIDOS

OBJETIVO DE LA ELECCION: Esta elección es para que los empleados que son elegibles para votar escojan a su representante, si hubiese alguno, con el fin de negociar colectivamente con el Empleador. (Fíjese en LA UNIDAD DE VOTACION en este Aviso de Elección, de los empleados que son elegibles para votar). La mayoría de votos válidos emitidos determinará los resultados de la elección. Solamente se puede celebrar una elección válida de representación dentro de un período de 12 meses.

PAPELETA DE VOTACION SECRETA: La elección será por votación secreta a través del correo de los Estados Unidos bajo la supervisión del Director Regional de la Junta Nacional de Relaciones del Trabajo (JNRT). Una muestra de la papeleta de votación oficial se muestra en la siguiente página de este Aviso. Los votantes podrán votar sin interferencia, restricción, ni amenaza. Los empleados elegibles para votar recibirán por correo, las *Instrucciones Para los Empleados que Votan por el* Correo *de los Estados Unidos,* una papeleta de votación, un sobre azul, y un sobre amarrillo con su dirección y franqueo pre-pagado.

REGLAS DE ELEGIBILIDAD: Los empleados elegibles para votar son aquellos que están definidos según la UNIDAD DE VOTACION en la siguiente página, e incluye a los empleados que no trabajaron durante el período de la nómina designada porque estaban enfermos o en vacaciones, o estaban temporalmente descansados. Los empleados que hayan renunciado o que hayan sido despedidos con causa desde el período de la nómina designada y quienes no hayan sido recontratados o reincorporados antes de la fecha de esta elección *no* son elegibles para votar.

IMPUGNACION DE LOS VOTANTES: Un agente de la Junta o un observador autorizado puede cuestionar la elegibilidad de un votante. Dicha impugnación debe de ser hecha al momento del conteo de las papeletas.

OBSERVADORES AUTORIZADOS: Cada parte puede designar un número igual de observadores, este número será determinado por la JNRT. Aquellos observadores (a) actúan como controladores en el área de votación y durante el conteo de los votos; (b) ayudan a identificar a los votantes; (c) impugnan a votantes y papeletas y (d) de otra forma asisten a la JNRT.

METODO Y FECHA DE LA ELECCION

La elección será conducida a través del correo de los Estados Unidos. Las papeletas de votación serán enviadas por correo a los empleados contratados en la unidad apropiada de la negociación colectiva. A las 4:30 p.m. del miércoles, 25 de mayo del 2016, las papeletas de votación serán enviadas por correo a los votantes desde la Junta Nacional de Relaciones del Trabajo, Región 12, ubicada en el 201 E. Kennedy Blvd., Ste. 530, Tampa, FL 33602-5824. Los votantes deben de firmar la parte de afuera del sobre en el cual la papeleta se regresa. Cualquier papeleta de votación recibida en un sobre que no esté firmado será automáticamente nula.

Aquellos empleados que creen que son elegibles para votar y no recibieron una papeleta por correo a más tardar el

1 de junio del 2016, deberán comunicarse de inmediato con la Junta Nacional de Relaciones del Trabajo, ya sea llamando a la Oficina de la Región 12 al (813)228-2641 o a nuestra línea telefónica gratis 1-866-667-NLRB (1-866-667-6572).

Los votantes deberán devolver sus papeletas de votación para que sean recibidas en la oficina de la Junta Nacional de Relaciones del Trabajo, Región 12, a más tardar el 8 de junio del 2016. Todas las papeletas serán mezcladas y contadas en la Oficina de la Región 12 el jueves, 9 de junio del 2016 a las 10:00 a.m. en la oficina de la Junta Nacional de Relaciones del Trabajo, Región 12, ubicada en el 201 E. Kennedy Blvd., Ste. 530, Tampa, Florida 33602. Para que sean válidas y contadas, las papeletas de votación regresadas deberán ser recibidas en la Oficina de la Región 12 antes del conteo de las papeletas.

Form NLRB-4910
(4-2015)

Estados Unidos de América
Junta Nacional de Relaciones del Trabajo

AVISO DE ELECCION

INSTRUCCIONES PARA LOS EMPLEADOS QUE VOTAN POR CORREO DE LOS ESTADOS UNIDOS

UNIDAD DE VOTACION

EMPLEADOS QUE SON ELEGIBLES PARA VOTAR:

Todos los albañiles de ladrillos y /o albañiles de mampostería empleados por el Empleador.

EMPLEADOS QUE NO SON ELEGIBLES PARA VOTAR:

Todos los demás empleados, empleados de oficina o con trabajo de oficina, empleados profesionales, guardias y supervisores como está definido por la Ley.

NOTA:

Aquellos que son elegibles para votar en la elección son los empleados de la unidad mencionada arriba quienes fueron empleados durante el periodo de la nómina de sueldos que termina el 29 de abril del 2016, que incluye a los empleados que no trabajaron durante ese periodo porque estaban enfermos, de vacaciones o a quienes se les dio temporalmente un paro forzoso (laid off).

También son elegibles para votar todos los empleados de la unidad(es) quienes ya sea (1) estuvieron empleados por un total de 30 días laborables o más dentro de los 12 meses anteriores a la fecha de elegibilidad de la elección o (2) tuvieron algún empleo dentro de los 12 meses anteriores a la fecha de elegibilidad de la elección y estuvieron empleados 45 días laborables o más dentro de los 24 meses inmediatos antes de la fecha de elegibilidad de la elección. Sin embargo, no son elegibles los empleados que cumplen con cualquiera de esas condiciones que fueron despedidos con causa, o que renunciaron voluntariamente antes de la finalización del último trabajo para lo cuales fueron empleados.

UNITED STATES OF AMERICA
National Labor Relations Board

ESTADOS UNIDOS DE AMERICA
Junta Nacional De Relaciones Del Trabajo
12-RC-175179

OFFICIAL SECRET BALLOT
For certain employees of

PAPELETA SECRETA OFICIAL
Para Ciertos Empleados De
ADVANCED MASONRY ASSOCIATES, L.L.C. D/B/A ADVANCED MASONRY SYSTEMS

Do you wish to be represented for purposes of collective bargaining by
¿Desea usted estar representado para los fines de negociar colectivamente por
BRICKLAYERS AND ALLIED CRAFTWORKERS LOCAL 8 SOUTHEAST?

MARK AN "X" IN THE SQUARE OF YOUR CHOICE
MARQUE CON UNA "X" DENTRO DEL CUADRO DE SU SELECCIÓN

YES **SI**	**NO** **NO**
☐	☐

DO NOT SIGN THIS BALLOT. See enclosed instructions.
The National Labor Relations Board does not endorse any choice in this election. Any markings that you may see on any sample ballot have not been put there by the National Labor Relations Board.

NO FIRME ESTA PAPELETA. Vea las instrucciones incluidas.
La Junta Nacional de Relaciones del Trabajo no respalda a ninguna de las opciones en esta elección. Cualquier marca que se pueda ver en cualquier muestra de la papeleta no fue hecha por la Junta Nacional de Relaciones del Trabajo.

ADVERTENCIA: Este es el único aviso oficial de esta elección y no deberá ser mutilado por ninguna persona. Cualquier marca que usted vea en cualquier papeleta de muestra o en cualquier parte de este aviso, ha sido hecha por personas ajenas a la Junta Nacional de Relaciones del Trabajo, y no han sido puestas ahí por la Junta Nacional de Relaciones del Trabajo. La Junta Nacional de Relaciones del Trabajo es una agencia del Gobierno de los Estados Unidos, y no respalda a ninguna de las opciones en esta elección.

Form NLRB-4910
(4-2015)

Estados Unidos de América
Junta Nacional de Relaciones del Trabajo

AVISO DE ELECCION

INSTRUCCIONES PARA LOS EMPLEADOS QUE VOTAN POR CORREO DE LOS ESTADOS UNIDOS

DERECHOS PARA EMPLEADOS – LA LEY FEDERAL LES DA EL DERECHO DE:

- **Formarse, unirse o apoyar a una unión**
- **Escoger a representantes para que negocien de su parte con su empleador**
- **Actuar junto con otros empleados por beneficio y protección mutua**
- **Elegir no participar en ninguna de estas actividades protegidas**
- **En un Estado donde tales acuerdos son permitidos, la Unión y el Empleador podrán celebrar un acuerdo legal de protección sindical que requiera que los empleados paguen cuotas periódicas y cuotas de iniciación. Los no-miembros que informen a la unión de su objeción a que sus pagos sean usados con propósitos no representativos, podrán ser requeridos de pagar solo la porción de los costos de la unión por actividades representativas (tales como negociación colectiva, administración de contratos y resolución de quejas).**

Es la responsabilidad de la Junta Nacional de Relaciones del Trabajo proteger a los empleados en el ejercicio de estos derechos.

La Junta desea que todos los empleados que sean elegibles para votar estén completamente informados sobre sus derechos según la ley Federal y desea que ambos, El Empleador y las Uniones, sepan que se espera de ellos cuando se celebra una elección.

Si los agentes, tanto de las Uniones o del Empleador interfieren con sus derechos de tener una elección libre, justa, y honesta, la elección podría ser desestimada por la Junta. Cuando es apropiado, la Junta proporcionara otros recursos, tales como la reincorporación de los empleados despedidos por ejercer sus derechos, incluyendo el pago retroactivo por parte de los responsables de sus despidos.

Los siguientes son ejemplos de conductas que interfieren con los derechos de los empleados y puede resultar en la desestimación de la elección:

- **Un empleador o la unión que amenace con la pérdida de trabajos o beneficios.**
- **Una de las partes capaces que promete u otorga promociones, aumento de sueldos, u otros beneficios para influenciar el voto del empleado.**
- **Un empleador que despide a empleados para desalentar o alentar la actividad de unión, o una unión que cause sus despidos para alentar la actividad de la unión.**
- **Dar discursos de campaña para congregar grupos de empleados en horas de trabajo, donde la asistencia es obligatoria, dentro del periodo de las 24 horas antes de que los centros de votación abran por primera vez, o que las papeletas de votación por correo sean despachadas.**
- **Un empleador o la unión que instigue prejuicios raciales o religiosos por medio de apelaciones inflamatorias.**
- **Una unión o un empleador que amenace a los empleados con fuerza física o violencia para influenciar sus votos.**

La Junta Nacional de Relaciones del Trabajo protege su derecho a una libre selección.

No se permitirán conductas inapropiadas. Se espera que todas las partes cooperen totalmente con esta Agencia para mantener los principios básicos de elecciones justas como es requerido por la ley.

Cualquier persona con preguntas sobre una elección puede contactar a la Oficina de la JNRT al (813)228-2641 o visitar la página web de la JNRT www.nlrb.gov para ser asistido.

ADVERTENCIA: Este es el único aviso oficial de esta elección y no deberá ser mutilado por ninguna persona. Cualquier marca que usted vea en cualquier papeleta de muestra o en cualquier parte de este aviso, ha sido hecha por personas ajenas a la Junta Nacional de Relaciones del Trabajo, y no han sido puestas ahí por la Junta Nacional de Relaciones del Trabajo. La Junta Nacional de Relaciones del Trabajo es una agencia del Gobierno de los Estados Unidos, y no respalda a ninguna de las opciones en esta elección.

CASE NO. 18-14163

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ADVANCED MASONRY ASSOCIATES, LLC
d/b/a Advanced Masonry Services

(Petitioner/Appellant)

vs.

NATIONAL LABOR RELATIONS BOARD

(Respondent/Appellee)

A Petition for Review of an Order of the National Labor Relations Board

N.L.R.B. Case No. 12-CA-22114

Tab No: 111

EXHIBIT

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ADVANCED MASONRY ASSOCIATES, LLC
d/b/a ADVANCED MASONRY SYSTEMS

and Cases 12–CA–176715
12–RC–175179

BRICKLAYERS AND ALLIED CRAFTWORKERS,
LOCAL 8 SOUTHEAST

Caroline Leonard, Esq. for the General Counsel
Gregory A. Hearing and Charles J. Thomas, Esqs.
(Thompson, Sizemore, Gonzalez & Hearing, P.A.),
Tampa, FL for the Respondent
Kimberly C. Walker, Esq., Fairhope, AL for the Charging Party

DECISION AND REPORT

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. These consolidated cases were tried in Tampa, Florida on February 6–10, 2017. The amended unfair labor practice complaint alleges that Advanced Masonry Associates, LLC d/b/a Advanced Masonry Systems (the Company or Respondent) sought to undermine support for the Bricklayers and Allied Craftworkers, Local 8 Southeast (the Union) by unlawfully interrogating, threatening, and discharging employees prior to a representation election that ended in a 16-16 tie vote in violation of Sections 8(a)(1) and (3) of the National Labor Relations Act.[1] In the representation case, the Union seeks to have the challenged votes of 14 former employees counted. In addition, the Union contends that, if the challenged votes do not result in its favor, the Company's objectionable conduct, which consists of the alleged unfair labor practices and certain other conduct, warrants a rerun of the election.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Company, and the Union, I make the following

[1] 29 U.S.C. §§ 151-169.

FINDINGS OF FACT

I. JURISDICTION

The Company is engaged in business as a masonry contractor in the construction industry performing commercial construction at jobsites throughout the State of Florida where it annually purchases and receives goods valued in excess of $50,000 directly from points located outside the State of Florida and from enterprises located within the State of Florida, each of which received the goods directly from points located outside the State of Florida. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union and its predecessor entity, Bricklayers and Allied Craftworkers, Local 1, Florida, have been labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES AND OBJECTIONABLE CONDUCT

A. The Company's Operations

The Company's masonry projects are procured by competitive bids and are located across the State of Florida, primarily in the central and southwestern parts of the state. Richard and Ron Karp, the principles and owners, are based out of the Company's Sarasota, Florida headquarters. Ron Karp is primarily responsible for negotiating and finalizing the Company's bids and contracts for work, and has very little involvement with the Company's day-to-day operations.[2]

Marc Carney, the Chief of Operations, oversees the foremen on each jobsite and travels between jobsites, ensuring that all work is completed in accordance with contractual deadlines. The foremen are responsible for ensuring the quality of the work by masons and laborers, and are eligible for bonuses if they finish a project ahead of schedule.

The standard Company workday for masons is 7 a.m. to 3:30 p.m. Employees are permitted two 15-minute breaks and a 30-minute lunch break. During breaks, employees are permitted to access food trucks stationed in adjacent parking lots.

The size of the Company's skilled work force fluctuates depending upon the scope of the project and the Company hires and lays off masons as needed. The Company customarily offers masons work at other locations upon completion of a job, when available. Historically, the Company has requested the referral of masons from the Union.

The Company's personnel files for all employees are stored at its Sarasota headquarters. The front of each file folder is preprinted with a personnel information form, including contact information and an employment history section, which indicates date of hire, name of the supervising foreman, and dates and reasons for separation as they occur.

[2] Richard Karp was present throughout the hearing, but did not testify and his role is unknown.

During the relevant time period, the Company performed masonry work at several jobsites in central Florida: Bethune-Cookman University in Daytona Beach (Bethune); the Westshore Yacht Club in Tampa (Westshore); the University of Tampa (UT); the Hermitage in St. Petersburg (Hermitage); and the Holiday Inn Express in St. Petersburg (Holiday Inn).[3]

B. Safety Training

Fall protection for work by masons and other trades performing work above certain elevations are governed by construction industry standards and regulatory requirements of the Occupational Health and Safety Administration (OSHA). As such, the Company maintains safety rules relating to fall protection, along with any additional safety mandates invoked by its projects' general contractors.

The Company's Employee Handbook, effective January 2015, lays out the Company's basic safety rules requiring employees to comply with them as a condition of employment. (8.1). The basic rule requires employees to "[a]lways wear or use appropriate safety equipment as needed. Wear appropriate personal protective equipment, like . . . fall protection, when working on an operation which is potentially hazardous." Potentially hazardous is further defined to encompass "all elevated locations." (8.3). Violations of these safety rules, including the failure to wear safety equipment, "can result in disciplinary action, including termination." (4.1).[4]

The Company's safety rules are further implemented through its policies and procedures. In essence, an employee working at 6 feet or higher on a scaffold in a setting where a fall risk exists must use appropriate protective equipment.[5] Employees are required to "wear a full body harness with a lanyard or retractor in all elevated areas not protected by guardrails," and instructs that employees must never connect two lanyards, or a retractor and a lanyard to each other. The policy also warns that the Company has "zero tolerance" toward, and will discipline an employee who, violates the Company's fall protection rules after receiving the applicable safety training. [6]

The Company Safety Director, Aleksei Feliz, and Safety Coordinator, Fernando Ramirez, are responsible for providing safety orientation to new employees at their jobsites. The training is supposed to include a demonstration of how to wear a safety harness in conjunction with other equipment used to tie the worker to an anchor point.[7] They, as well as the foreman on Company projects, are responsible for monitoring and enforcing compliance safe working conditions and equipment. Foremen also deliver weekly "toolbox talks." These talks are mandatory prework meetings where foreman discuss various safety topics. The employees are then supposed to be provided with safety harnesses and other safety equipment, if they do not already have them.

[3] Jt. Stip. 4–6.
[4] R. Exh. 2.
[5] The Company's safety rule is stricter than the 10-foot requirement promulgated by OSHA.
[6] Nowhere is it written that the Company's enforcement of its "zero tolerance" policy is limited to violations observed by Company safety personnel and foreman, as opposed to violations observed by general contractors' representatives. (GC Exh. 2(a); R. Exhs. 4, 7. Nevertheless, that contention by Feliz was not disputed. (R. Exh. 2 at 8; R. Exh. 3; Tr. 80–81, 94, 98–100.)
[7] R. Exh. 5–6.

C. Bethune-Cookman University

At the Bethune jobsite, the Company's masons constructed four multistory dormitory buildings during the period of November 9, 2014, to June 19, 2016. The Company employed between 50 and 70 masons at Bethune. The job had two phases, with each phase consisting of work in the interior and exterior of the structures, laying block, brick and concrete.

Robert Dutton was foreman on the Bethune project from May 2015 until April 24, 2016, when he was replaced by Brent McNett. By January 2016, most block work was completed and only brickwork remained. The brickwork was completed by April 8, 2016. During that period, the mason workforce gradually diminished. Some were laid off, while others voluntarily quit for other jobs. Once the masonry work at Bethune was completed, the Company warranted the work for a 1-year period beginning on September 15, 2016.[8]

Of the 11 remaining individuals whose ballots were challenged, only one separated from the Company prior to January 2016. Robert Harvey was a mason employed on the Bethune jobsite during 2015. He was one of numerous employees for whom the Company provided hotel lodging. On October 9, 2015, the Company terminated Harvey for poor time and attendance, and for "causing problems at the hotel."[9]

On January 15, 2016, the Company pared its Bethune work force to about 40 masons. At the time, the Company had nearly completed the block portion and was beginning the brickwork. McNett laid off several masons that day, including John Smith and David Wrench, and told them to file for unemployment. The Company, however, generated Reason for Leaving (RFL) forms for each, incorrectly stating the grounds for their separation from the Company. Smith's RFL form stated that he was terminated for poor work performance and attendance, [10] while the RFL form for Wrench, who worked 121 days during the eligibility period and wore a union shirt on the job, stated that he voluntarily quit.[11]

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[8] McNett's testimony that the Company did not lay off anyone prior to April 8 was not credible. By that date, the "the last brick was laid" at the Bethune project and the work force was significantly down from the numbers in January and Carney conceded that the project essentially concluded in April 2016. (Tr. 652–654, 707, 712, 718, 721, 815–816, 896, 1005.) By his own admission, some workers "were going to different jobs because they wanted to work. They didn't want to quit working with [the Company]; they wanted to stay working when it was done." (Tr. 653; R. Exh. 43-53.)

[9] I based this finding on the somewhat inconsistent, but unrefuted, testimony of McNett and Feliz, as corroborated by the termination form, which referred to an "[a]ttached T.S." (presumably referring to Harvey's timesheet) and "causing problems at the hotel." (Tr. 656–657, 913–919, 926, 941–950; R. Exh. 29, 32, 60, 60(a).)

[10] The testimony of McNett and Feliz, as well as the written entry on the RFL form, that Smith was terminated for poor work performance and attendance on January 15, 2016, were not credible for several reasons. (Tr. 655–657, 1057–1058; R. Exh. 32.) First, Smith, who worked fulltime on Bethune project since Jly 2015, has since been rehired by the Company for other masonry jobs and, in fact, is currently working for the Company. (CP Exh. 19; Tr. 714, 997–1000, 1004–1005). Secondly, the Company's identification of Smith as laid-off on the official voter eligibility list was consistent with his testimony. (CP Exh. 2–3; Tr. 999–1005.)

[11] I based this finding on Wrench's credible testimony, as corroborated by his uncontested filing for unemployment compensation benefits. (Tr. 985–991, 1019; R. Exh. 27 at 1; CP Exh. 18.)

Robert Baker and Mark France, known union members, voluntarily quit the Bethune project on February 11, 2016.[12] Robert Pietsch, another known union member, worked as a mason on the Bethune project from September 2015 until he voluntarily quit on March 18, 2016.[13]

Another group of masons, including Jacob Barlow and Dustin Hickey, were laid off on or around April 1, 2016, as the Bethune project wound down. Barlow and Hickey, known union members, worked for the Company on and off over a long period of time. McNett, however, incorrectly listed his separation from the Company as "VQ", i.e., voluntarily quitting. In fact, McNett has continuously attempted to get Barlow, who is currently on another job, to return.[14]

Forest Greenlee also worked as a mason for the Company on and off over a period of years. He worked on the Bethune project until he was laid off "with a group of people" on April 2, 2016. He left with a reasonable expectation of recall and has since been rehired by the Company.[15]

Jeremy Clark, another known union member, worked for the Company on and off over a long period of time. He worked on the Bethune job until the project started winding down and he was laid off on April 4, 2016. He left with a reasonable expectation of recall.[16]

George Reed, a known union member, has worked for the Company as a mason on an off over a period of years. He was referred to work on the Bethune job by Bontempo and worked 82

[12] I credit the Company's entries in the forms for Baker and France. They were generated by Phelps based on information provided by McNett. He conceded that he had made disparaging remarks about the Union. Baker would have been eligible to vote based on his hours worked prior to the election. (CP Exh. 14.) However, there was an absence of evidence to refute McNett's testimony that Baker and France voluntarily quit. Moreover, the fact that France's RFL form was signed by Ron Karp , who lacked personal knowledge about France's departure, does not detract from the fact that the form was otherwise created by Phelps in the ordinary course of recording reports called in by foreman. (Tr. 654–655, 887–888, 891; R. Exh. 27 at 2, 28 at 1; CP Exh. 24(c) and (g).)

[13] Pietch, who did not testify, was a known union member. (CP Exh. 17 and 27.) He would have been eligible to vote based on his hours worked in the critical period. (CP Exh. 14.) However, I credit the statements in Pietsch's RFL form that he "[l]eft for another job (cash pay job)" as made by Phelps based on information conveyed to by telephone by Dutton. (R. Exh. 27 at 3.) That the form was signed-off by another foreman on the project does not otherwise negate the rest of the record as one made in the Company's regular course of business. (Tr. 705–707.)

[14] I do not credit McNett's vague testimony that Barlow and Hickey voluntarily quit. It is highly unlikely that a "large group" simply quit on April 1 and find it likely that they were told to find other employment. The Company initially identified Barlow and Hickey, who it employed on and off over a long period, as laid off in its voter eligibility lists. (CP Ex. 2, 3 and 26(a) and (c); Tr.707–708, 815–816, 1019, 1027; R. Exh. 27 at 4, 6; CP Exh. 2–3, 26(a), (c) and (d).)

[15] The Company's entry in the RFL form stating that Greenleee quit was incorrect. (R. Exh. 27 at 7.) First, the Company initially identified him as laid off in its voter eligibility lists. (CP Exh. 2–3, 26(d)). Second, Greenlee was part of a "group" that left the project at the beginning of April, an unlikely coincidence. Third, Greenlee has since been rehired by the Company. (Tr. 815–816.)

[16] In light of the admissions in the Company's initial Excelsior lists that Clark was laid off, I do not credit McNett's vague testimony that he voluntarily quit. Clark had worked intermittently for the Company since 2014. (Tr. 710; CP Exh. 2–3, 24(f), 26(b); R. Exh. 27 at 5.)

days between December 2015 and April 15, 2016, when he was laid off. Dutton subsequently sought to recall Reed but, by then, he had been referred to another job by Bontempo. Reed did, however, return to the Company's employ on August 22, 2016.[17]

D. Westshore Yacht Club

The Westshore condominium project in Tampa, Florida lasted from July 27, 2014, to September 18, 2016. The initial foreman, Todd Wolosz, oversaw the block work until February 2016, when he was replaced by Coy Hale. Foreman Brian Canfield oversaw the two concurrent projects in St. Petersburg, the Hermitage and the Holdiay Inn jobsites.

On February 9, Ramirez presented a 75-minute safety orientation at the Westshore jobsite parking lot. Ramirez conducted the training without any scaffolding by showing and demonstrating the use of safety equipment. The fall protection portion of the training lasted about 30 minutes. Ramirez, who is bilingual and fluent in Spanish, placed a harness on a dummy and himself. He did not, however, attach a harness to scaffolding and employees never had a chance to hook any of their equipment to the scaffolding during the training.

Ramirez explained during the training that work at 6 feet or higher, combined with exposure to a fall, required use of fall protection at the Company, and demonstrated the proper way to tie off using various pieces of protective equipment. He also showed employees how not to tie off. Referring to the illustration, Ramirez instructed employees that the Company used retractable lifelines when tying harnesses off to scaffolding in order to have at least 3 feet of clearance from the ground following a fall. A safety strap could be used when the employee's anchoring point was above his shoulders or on the scaffold in conjunction with the lifeline if the employee looped the strap inside of itself. These techniques, which Ramirez demonstrated, also gave the same minimum clearance.

Employees were instructed to drill a hole in the floor of the building and insert a tie that springs open, locking the anchor into the concrete.[18] They were to then attach one end of their retractor, to the loop in the tie, and attach the other end of the retractor to their body harness.[19] If needed, employees could hook a nylon strap to the tie as an extension before attaching the retractor. Employees were also shown a short lanyard with a hook and told not to hook the short strap and the long nylon strap together; only to hook the retractor to the long strap. If employees could not use the tie in the floor, they were instructed instead to find something above them to hook into. Employees were also told not to hook the retractor directly to scaffold., but were not otherwise instructed on how to safely tie off to scaffolding.[20]

[17] The RFL signed by Ron Karp while compiling documents for this case stated that, according to Dutton, Reed voluntarily quit on April 15, 2016, because "he found a better job." (R. Exh. 28 at 2; Tr. 887–888, 891.) That representation was not credible. First, by April 15, the Bethune project was winding down. (Tr. 713, 907, 815–816.) Moreover, Dutton testified, but failed to refute Bontempo's credible testimony that Dutton told him that Reed "was laid off, put on the couch temporarily." In addition, Bontempo's testimony was corroborated by the Company recalling him on August 22. (Tr. 894–910, 1017–1019, 1034, 1039–1045, 1049.)

[18] GC Exh. 20.

[19] GC Exh. 24.

[20] Ramirez and Alvarez provided similar estimates as to the duration of the fall protection orientation.

Discriminatees Luis Acevedo and Walter Stevenson commenced work as bricklayers on the Westhore project on January 25, 2016, the former having referred by the Union.[21] Both attended the aforementioned safety training session. Acevedo told Ramirez that he did not need a harness issued by the Company because he had his own, but needed only a safety strap and a concrete anchor. Ramirez inspected Acevedo's harness, approved it, and later provided Acevedo with the additional equipment needed. Several employees, including Acevedo and Stevenson, asked questions during the orientation. Acevedo asked how to tie off to anchor points, especially using the 6-foot strap, which Ramirez explained. And in response to a question from Stevenson, Ramirez emphasized to everyone in attendance that anyone caught by the Company working at 6 feet or higher without proper use of fall protection would be terminated pursuant to the Company's zero tolerance policy on this point. Both Acevedo and Stevenson signed the orientation attendance sheet, as did the other employees in attendance at Westshore that day.[22]

Raymond Pearson, another former employee whose ballot was challenged, worked as a mason on the Bethune and Westshore projects. He worked 615 hours for the Company from October 2015 through February 2016, which would be the equivalent of 76 days during the eligibility period. Pearson, a union member who wore union insignia on his hard hat and shirts, was directed by foreman Coy Hale to correct faulty blocks laid by another mason, who was terminated because of the defective work. Pearson, however, failed to completely straighten, or make plumb, the block columns at issue. As a result, on February 10, 2016, Hale gave Pearson his final check and told him he was no longer needed on the Westshore job. Pearson was not discharged for cause, however, nor was he told that he was not eligible for rehire. In fact, Hale later told him that the Company would call him when it started another job.[23]

E. University of Tampa

The University of Tampa (UT) project entailed the construction of a two story sports complex, with work on both the inside and outside of the structure. The Company employed masons at that location from April 17 to July 24, 2016. McNett, assisted by another foreman, Mario Morales, remained on the project until its completion in July.[24]

Masons, working in pairs, initially worked on the outside of each building for about 2 weeks, laying a brick veneer over the new 40 to 50 foot high wall. Employees were not required to wear harnesses or otherwise utilize personal fall protection. They utilized scaffolding as they worked their way up the wall, and had metal railings on the other three faces. The work was

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(R. Exh.7; GC Exh. 2(a)-(b); (Tr. 414–17, 580, 583).

[21] Stevenson has never been a union member, although he became aware of the Union's campaign through information sent to him by the Company in 2016. [Tr. 128].

[22] GC Exh. 2(c).

[23] It is undisputed that Pearson failed to satisfactory complete the assignment given him by Hale. However, there is insufficient credible evidence that Hale actually informed Pearson that he was being terminated for cause, like the coworker whose work he was trying to fix, for poor work performance. (Tr. 505–508, 781–782, 790, 796–798, 837, 1008–1013; GC Exh. 12; CP Exh. 25(a)-(b); R. Exh. 31.)

[24] Id. at 7–9.

followed by work on the building's interior columns, which were 12 to 14 feet tall. No safety orientation was conducted for the employees at the UT jobsite.

In mid-April, the Company transferred Acevedo and Stevenson to the UT site at the start of the brickwork phase. Acevedo initially worked on the construction of the exterior walls of the sports. After 2 or 3 weeks working on the exterior, Acevedo was moved inside and started working on the building's interior columns. Stevenson worked with different masons as the project progressed.

Acevedo, an active union supporter, met with Union Representative Mike Bontempo during visits to the site and openly wore union shirts and stickers. He spoke with other employees about the benefits of the Union, including insurance and retirement. Acevedo also spoke with his foreman about union dues not being deducted from his paycheck even though he had submitted a dues authorization card. He spoke out at a meeting with his supervisor and other employees in favor of the Union when the supervisor spoke against the Union.[25]

F. The Union Files for 9(a) Labor Representation

The Company and the Union were parties to a collective-bargaining agreement formed pursuant to Section 8(f) of the Act covering the Company's masons from at least May 1, 2004, and until at least April 30, 2016.[26] Pursuant to that agreement, the Company paid masons an agreed-upon wage, and made monetary contributions to the union health, retirement and other funds based on hours worked by union masons, and later, for hours worked by non-union masons as well. The Company expressed its intention not to renew the Section 8(f) agreement when it expired, causing the Union to file a petition on April 29, 2016, for certification as the labor representative of the Company's skilled work force pursuant to Section 9(a) of the Act.

Pursuant to a Stipulated Election Agreement, approved on May 6, 2016, an election was conducted via U.S. Mail to determine whether employees of the Company wished to be represented for purposes of collective bargaining by the Union. The voting unit consisted of:

> All bricklayers and/or masons employed by the [Company], excluding all other employees, office and clerical employees, professional employees, guards and supervisors as defined in the Act.

Voter eligibility was defined pursuant to the Board's construction industry formula set forth in *Steiny & Co*., 308 NLRB 1323 (1992), reaffirming *Daniel Construction Co*., 133 NLRB 264 (1961). Under the *Steiny-Daniel* formula, any mason employed (1) for at least 30 days during the 12-month period preceding April 29, 2016, or (2) for at least 45 days during the 24-month period preceding April 29, 2016, could vote, with two exceptions: employees terminated for cause, and employees who quit voluntarily prior to the completion of the last job on which they were employed.[27]

[25] Acevedo's testimony regarding protected concerted activity was not disputed. (Tr. 392–412.)
[26] GC Exh. 14.
[27] RD Exh.1(c) at 1–2.

In preparation for the representation election, the Company relied on its human resource records, including personnel files, in generating its initial and amended *Excelsior* lists with the names and contact information of eligible voters. The Union generated its own list of eligible employees based on its copies of the Company's fringe benefit reporting forms.

Although the Company provided a voter list within the required 2 business days of the Stipulated Election Agreement, the list did not include seven employees—Raymond Pearson, Robert Baker, Mark France, Robert Harvey, Robert Pietsch, George Reed and David Wrench—who worked a sufficient number of hours for the Company in order to satisfy the *Steiny/Daniel* eligibility formula agreed to by the parties. However, four of these employees—France, Baker, Harvey and Pietsch—voluntarily resigned from Company projects prior to the election and, thus, they were rendered ineligible to vote. The remaining three employees—Pearson, Reed and Wrench were laid off and clearly satisfied the *Steiny/Daniel* eligibility formula.[28]

On May 17, 2016, the Company filed and served an amended *Excelsior* list. On at least three other occasions by electronic communication with Region 12, the Company attempted to amend the *Excelsior* list, including on May 20, 2016, to add an eligible voter; [29] on May 23 to exclude six eligible voters;[30] and finally on May 24, 2016 to exclude six eligible voters.[31]

G. The Preelection Period

1. The Union Campaign

Since 2013, Michael Bonetmpo, a former Company employee and foreman, has served as the Union's field representative. He developed a good working relationship with Ron Karp and Carney, and the Company would contact Bontempo to refer union members to work on Company projects. The Company hired many of Bontempo's referrals. Commencing in 2014 during the Bethune project, Bontempo, with Carney's agreement, was permitted to meet with employees at the jobsite during breaks, at lunchtime, and before and after work. After the Union filed its petition for Section 9(a) representation, Bontempo's visits took on a new meaning.

On or about April 18, 2016, shortly after the UT job commenced, Bontempo visited the jobsite at about 3:30 p.m. after first calling foreman Mario Morales. He informed Morales that he had drinks and shirts to distribute to the workers. Bontempo spoke to Acevedo, who told him that they were working overtime that day and asked Bontempo to come back around 5 p.m. Bontempo returned at 5 p.m. with beverages and union shirts to distribute to any employees who wanted them. Acevedo took two of the shirts. During the visit, Acevedo signed papers Bontempo brought for him regarding the union insurance plan. Bontempo also distributed union membership applications to several masons, and Acevedo helped explain the benefits of joining the Union to nonmember masons during the visit.

[28] It is undisputed that employees typically work an 8-hour workday.
[29] CP Exh. 4.
[30] CP Exh. 5.
[31] CP Exh. 6.

Bontempo's interaction with Alvarez did not go unnoticed by Morales. The following morning, Morales approached Acevedo in the parking lot and asked him what papers he had signed for the Union. Acevedo did not respond.[32]

After the representation petition was filed, Bontempo became more aggressive in his efforts to reach out to the Company's masons. He began to visit the Company jobsites during work periods, not just during break and lunchtime. He was asked by McNett on one occasion to leave the UT jobsite because it was working time. He was asked at the Holiday Inn jobsite by Canfield to speak to the workers after work. When Bontempo ignored the request, saying he would be brief, Canfield renewed the request and Bontempo acquiesced by waiting in the parking lot until after work. On two occasions at the Westshore jobsite, Hale caught Bontempo speaking to masons during worktime. He told him that he could only speak to the employees during lunchtime or after work and told Bontempo to leave.[33]

2. Antiunion flyers distributed

Following the filing of the representation petition, both parties actively campaigned for their respective positions. Company flyers urged a vote against union representation and were mailed to employees or provided along with their paychecks. Some company flyers highlighted that Florida is a "right-to-work" state and accused the Union of corrupt practices, including the misappropriation of union dues. The Union was referred to as the enemy and it was noted that the Company recently lost a $6 million contract to a nonunion company.[34] The Union mailed flyers to its members and distributed union paraphernalia to those interested in wearing them.

3. Threats of reduced wages

One day during early May 2016, with Feliz interpreting, Richard Karp spoke to masons on the UT job about the upcoming representation election. He explained that they would be receiving a ballot, and that the Company wanted employees to vote. In response to a mason's question as to whether wages would go down if they decided not to unionize, Richard Karp answered that wages are determined by the market. [35]

At lunchtime that day, Feliz followed up Richard Karp's remarks with his own meeting with eight Spanish-speaking masons, including Alvarez. Feliz explained why the Company opposed unionization and urged the employees to "vote for no, no union, because the Union is taking our money." He added that a union victory would result in hourly wages dropping from $22 to about $18 per hour. Acevedo challenged that assertion, resulting in a silent glare from

[32] I credit Acevedo's version of his encounter with Morales. Morales' denial that he asked about the papers was not credible. He initially testified that Bontempo called him about handing out drinks and shirts, and he acquiesced. However, he then attempted to walk that back by attributing his knowledge about Bontempo's activity to another mason who was not called to testify. (Tr. 297–298, 406–407, 726–731, 740–747, 760–762, 765, 770–772, 787; GC Exh. 12.)

[33] Bontempo did not credibly dispute the testimony of several foreman—McNett, Canfield and Hale—regarding his visits to their jobsites during worktime. (Tr. 276, 308, 643-644, 647-648, 822–823, 831–832, 643–647, 698–699, 725–732, 736–739, 743, 786–88, 822–824.)

[34] GC Exhs.7(a)-(m).

[35] This finding is based on Feliz's credible and undisputed testimony. (Tr. 103–106, 111–112.)

Feliz. Another mason asked whether the Company would provide employees with health insurance. Feliz responded that he did not have that information, but that, under the Affordable Care Act, he believed that employers had to offer insurance to all employees. Feliz concluded by imploring the employees not to vote for the Union.[36]

During the May 16 pre-work safety meeting with masons on the UT job, McNett, who regularly disparaged the Union, mentioned the Union campaign that was underway. He shared his opinion that it probably "won't be good for wages" if the Union won.[37]

H. Acevedo and Stevenson are Suspended for a Fall Protection Violation

On Monday, May 16, 2016, employees began the day by attending the mandatory prework safety meeting led by the UT general contractor. That meeting was followed by a Toolbox Talk led by McNett and Morales. Acevedo and Stevenson were present. During the meeting, McNett reminded employees of the Company's fall protection rule. He explained that some were being moved from outside work to inside work, and that employees would have to tie off once at elevations of higher than 6 feet.[38] McNett also warned that anyone not properly tied off would be fired. Neither McNett nor Morales, however, issued instructions or demonstrated how to tie off under the circumstances.

Prior to this meeting, neither Alvarez nor Stevenson had been tying off. Nor did anyone say anything to them about tying off. Neither Acevedo nor Stevenson asked any questions about the need for fall protection, or how to tie off properly, and neither alleged that OSHA regulations prohibited tying off to scaffolding.

Shortly after the conclusion of the toolbox talk on May 16, Morales toured the jobsite. Morales observed Acevedo and Stevenson working on a column on open scaffolding above 6 feet, with neither man wearing his safety harness. Morales asked Acevedo and Stevenson whether they attended the meeting where McNett reminded workers to tie off above six feet. Acevedo replied dismissively, saying that he hadn't been tied off when working on the outside part of the building. Morales responded that those circumstances were different, since Acevedo and other masons had used a different type of scaffold and had a wall in front of them. Acevedo then brushed off Morales' concern for the second time, saying that he wasn't going to fall. Morales made Acevedo and Stevenson climb down from the scaffold and retrieve their harnesses. [39]

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[36] I credited Acevedo's detailed testimony over that of Feliz. Feliz's denial that he spoke about wages was contradicted by Gerardo Luna, a mason who has been consistently employed by the Company over the past 10 years. (Tr. 45–47, 92–93, 103–06, 409–12, 846–50, 911–12.)

[37] McNett, who accused the Union of tricking employees into signing up and then stole their dues, essentially corroborated Stevenson's version of what he said at the meeting regarding the impact that unionization would have on wages. (Tr. 129–130, 648.)

[38] Under the Company's fall protection rule, outside work required protection only at the open ends of the scaffolds; otherwise, employees working at elevation had a wall in front of them and guardrails behind them. In contrast, any inside work done at elevation needed fall protection, because the individual scaffolds were not as elaborate, and because the 7-foot width of the scaffolds, set against to the narrower columns under construction, left the sides and ends open.

[39] Except for Acevedo's selective memory in failing to recall whether fall protection was discussed in

Morales proceeded to speak with McNett, who was doing some paperwork, at about 8 a.m. on May 16. Morales reported that Acevedo and Stevenson were on a scaffold and not tied off, and that he had directed them to retrieve their harnesses. At approximately 8:30 a.m., McNett returned to the second floor through a stairwell that opened most closely to the column where Acevedo and Stevenson were working. He immediately admonished them for improperly tying the harness and warned that they were at risk for falling. McNett asked Acevedo and Stevenson if they had received safety harness orientation. Both denied receiving any training on how to tie off while working on a scaffold. McNett unhooked the strap and retractor from Acevedo's harness, then wrapped the strap around the scaffolding. McNett then reattached the retractor to the strap and to Acevedo's back, and repeated the procedure for Stevenson. Acevedo told McNett that it was against OSHA regulations to prohibit employees from tying off on scaffolding. McNett did not reply and walked away.[40]

McNett called Feliz and recounted what had happened. In particular, he related that he had two employees who were claiming that the Company had not trained them on how to tie off and use harnesses. When Feliz asked where the two employees had come from, McNett said that they had come from Westshore. Feliz answered that everyone on that job had been trained. He told McNett that he would have Ramirez investigate, and if the employees in fact had been trained, they would be dismissed. Feliz and Ramirez then spoke by telephone. Feliz relayed the information from McNett that two masons at UT, formerly at Westshore, violated the Company's fall protection rule. He directed Ramirez to visit the UT jobsite and ascertain whether the two masons had been trained properly on fall protection.[41]

Ramirez returned to UT jobsite around 12 p.m., with the Westshore orientation booklet. He showed McNett the booklet and the signatures in it. McNett said that he and another supervisor had observed Acevedo and Stevenson working at elevation above 6 feet and not using fall protection correctly, and that both had claimed no one had ever trained them on fall protection. Ramirez walked over to where Acevedo and Stevenson, who had descended from their scaffold, had been working. He observed that the scaffold had places where a fall risk existed, and that the scaffold was appropriate to tie off to, with a place on the frame for that purpose. Holding the orientation booklet in his hand, Ramirez asked the employees whether they remembered being trained on fall protection at Westshore, as part of an hour and fifteen minute orientation. Both Acevedo and Stevenson confessed that they did. Ramirez showed them their signatures on the attendance page.[42]

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that meeting, there is no dispute that McNett and Morales issued that safety directive on May 16. (Tr. 137–41, 153, 158–60, 396-97, 418–22, 620–23, 670-71, 700, 762–65; R. Exh. 14.)

[40] I credit testimony by McNett and Morales that Alvarez and Stevenson were tied off incorrectly. However, McNett's generalized testimony failed to credibly refute Alvarez's contention that other masons were tied up in different ways, with some tied to the scaffold and others to the cross-bracers. (Tr. 139-40, 158-60, 396-97, 422–25, 475-78, 624–30, 670-71, 764–68, 675-76.)

[41] It is undisputed that Feliz and Ramirez quickly established that Alvarez and Stevenson received fall protection training on the Westshore job. (Tr. 89–90, 111, 534–535, 567,630–31, 700–01).

[42] Neither Alvarez nor Stevenson disputed this encounter with Ramirez. (Tr. 41–42, 76, 90–91, 111, 535–540, 567-570, 631–632, 701; GC Exh. 5–6.)

Ramirez contacted Feliz. He confirmed the fall protection violation; related that he had trained the two masons personally; conveyed that he had documented their training; and described how the masons had conceded their attendance. Feliz, who wanted to review the training documentation himself before making a final decision, advised Ramirez to fill out Employee Warning Notices for the employees, which Ramirez did. The Employee Warning Notices provided to Alvarez and Stevenson each stated that "the employee was not tie-off (sic) properly." They also indicated that they were a level "1 " offense of a scale ranging from "l" to "2" to "3" to "FINAL.""[43]

At lunchtime, McNett and Ramirez, who had come to the site a little after 12 p.m., found Acevedo on his break. McNett accused Acevedo of lying to him about getting safety orientation. Acevedo conceded receiving a safety orientation during the Westshore job, but not to tie off behind him, and that "by law, nobody's supposed to tie it up to the scaffold." Acevedo continued, saying that no one had been using a harness, even outside, working at the height they had been, risking their lives, and now he was being required to wear it working at only 7 feet high. McNett told Acevedo that they were not supposed to use the harness when working facing towards the wall. Stevenson came by during this conversation and McNett told him to come over. McNett and Ramirez told Acevedo and Stevenson to sign the warnings Ramirez had filled out, because they were being sent home for the day for tying off incorrectly. Referencing the "cinnamon bun" method McNett had done with their straps, Stevenson asked, "Why weren't we told that before we got up there? You just said tie off." McNett replied, "It's not in my hands. I was told to send you home, and you're in review." Both men signed the papers, which were their first and only warnings for fall protection violations—and, in fact, their first discipline of any kind while working for the Company—and went home.[44]

I. Feliz Discharges Acevedo and Stevenson after Discussions with Senior Management

Aware that Acevedo was a union member and the representation election was coming up, Feliz discussed the discipline of Alvarez and Stevenson with the Company's owners, Ron and Richard Karp.[45] The decision was then made to discharge Acevedo and Stevenson. Feliz communicated that decision to McNett.[46] Feliz then filled out Reason for Leaving Forms for indicating that Alvarez and Stevenson were terminated.[47]

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[43] GC Exh. 5–6.

[44] I credit the testimony of Alvarez and Stevenson that other masons were also working at elevated heights over 6 feet without being tied off. The conclusory and overly generalized testimony of McNett and Morales to the contrary did little to counter their assertions. (GC Exh. 5–6; Tr. 89, 139–142, 424–429, 539–540, 632–633).

[45] Bontempo's testimony merely confirmed interaction between foreman and upper management regarding increases or decreases in staffing projects. However, that interaction did not extend to individual personnel actions which Bontempo was authorized to undertake on his own. (Tr. 188.)

[46] I do not credit Feliz's testimony that he did not mention the names of the employees involved. Unlike other employees disciplined for fall protection violations, this communication with the owners before taking disciplinary action was unprecedented. It was precipitated, in Feliz's words, because Alvarez was a member of the Union and Feliz, who had made antiunion remarks in the past, knew that the election was looming. (Tr. 89–94, 119, 541, 633–635, 874, 879–881.)

[47] GC Exh. 9–10.

Acevedo arrived at work the following day, May 17 and was informed by McNett that he was being let go. In response to Acevedo's request for an explanation, McNett said he was being fired for violating safety regulations. Once again, Acevedo responded that it is an OSHA violation to tie off to scaffolding. McNett responded by calling him a liar and telling him that he was fired. Acevedo asked McNett if he was firing him because he is a union guy. McNett responded "this is America; fight for your rights."[48]

Acevedo then returned to the parking lot, called Stevenson and told him that both of them were fired. Acevedo then called Feliz, who replied "that's the way it is, there's nothing that we can do. I'm sorry, that's what it is." Stevenson still proceeded to go to the jobsite and spoke with McNett, who told him that the decision "came from above, it's not me."[49]

Both employees called Feliz the next day. Acevedo asked that his termination be changed to a layoff, so that he might receive unemployment. Feliz declined, but Alvarez filed for unemployment compensation benefits anyway. The Company opposed Alvarez's claim with the Connecticut Department of Labor, but it was granted. Stevenson also called Feliz. Contrite, he told Feliz that "we were wrong," adding that he hoped for another chance on a future job.[50]

J. Other Fall Protection Violations on Respondent's Jobsites

In the months preceding the discharges of Alvarez and Stevenson, four employees were disciplined for safety violations involving fall protection. Two of them, Brandon Carollo and Timothy Golphin, were discharged on February 10, 2016. Richard Haser was suspended on February 19, 2016. Timothy Bryant was suspended on March 8, 2016. In addition, Jaswin Leonardo was discharged on May 26, 2016, 10 days after Alvarez and Stevenson were discharged.

Carollo, a laborer on the Bethune job, was discharged after being observed working without a safety harness and hurling an expletive at McNett when the latter spoke to him about the violation. The incident was Carollo's third fall protection violation. Previously, he received a warning and 2-day suspension on June 24, 2015, after being observed working at an elevated level on a scaffold without fall protection equipment in place. On August 10, 2015, Carollo was again warned and suspended for 3 days after he was observed by the general contractor's representative walking on scaffolding without being tied by a harness.[51]

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[48] I base this finding on the credible testimony of Alvarez. McNett may have been a former union member, but as a supervisor he expressed antiunion sentiment here and on several other occasions. (Tr. 428–431, 477–479, 634–635).

[49] Feliz did not refute Alvarez's credible testimony regarding their conversation after the latter was fired. (Tr. 94, 430.) Similarly, McNett did not refute Stevenson's credible testimony that the former admitted that the order to suspend was not in his hands and the order to fire him "came from above, it's not me." (Tr. 140–141, 633–636.)

[50] R. Exh. 20–21; Tr. 94, 478.

[51] Notwithstanding the confusion as to whether Dutton or McNett terminated Carollo, the evidence indicates that Carollo's termination was predicated on a third fall protection violation and insubordination. (GC Exh. 8(a)-(e); Tr. 542–543, 571–572, 638–640, 899.)

Golphin, a scaffold builder/laborer on the Bethune job, was discharged on February 10, 2016, because he was talking on his cellular phone while working and was not tied off at an elevation of 38 or 40 feet.[52]

Haser was observed by the general contractor's representative to be working above 6 feet on the Bethune jobsite while not tied off. It was his second offense. He was sent home and was required to complete the general contractor's safety orientation before being permitted to return to the job.[53]

Bryant, a mason who attended Westshore training along with Alvarez and Stevenson was observed by Ramirez not wearing a harness or otherwise connected to his anchor point as he lay block 18 feet off the ground. Ramirez sent Bryant home, but he returned to work 2 days later. Bryant was subsequently terminated for insubordination a little over a month later.[54]

Leonardo was discharged from the Midrise project after failing to use fall protection at an elevation of about 10 feet and improperly dismounting the scaffold by stepping on the cross-braces instead of using a ladder.[55]

K. The Representation Election

The election was conducted by mail, with approximately 110 eligible voters. The Board mailed the ballots on May 26, 2016, and tallied them on June 9, 2016. The ballot tally showed 16 votes cast for the Union, 16 votes cast against the Union, 2 votes voided, and 22 challenged ballots. The challenged ballots were sufficient in number to affect the election results.

By Stipulation, approved on November 17, 2016, the Company and Union resolved 8 of the 22 determinative challenged ballots. The challenged ballots cast by David Almond, Brian Canfield, Marc Carney, Robert Dutton, Coy Hale, Brett McNett, Mario Morales and Todd Wolosz were disqualified and those individuals were deemed ineligible to vote. As a result, the Tally of Ballots was revised on November 17, 2016, showing 14 challenged ballots. Five of the challenged ballots are from employees alleged by the Company to have been terminated for cause: Acevedo, Stevenson, Raymond Pearson, Robert Harvey and John Smith. The remaining 9 employees were alleged by the Company to have quit voluntarily during the Bethune project: David Wrench, Robert Baker, Jacob Barlow, Jeremy Clark, Mark France, Forest Greenlee, Dustin Hickey, Robert Pietsch, and George Reed.

On June 16, 2015, the Union timely filed 10 Objections to conduct affecting the results of the election. The objections substantially mirror the unfair labor practice charges in the complaint. On December 13, 2016, after a preliminary investigation of the Challenged Ballots and Objections, the Regional Director's Report on Objections and Challenged Ballots found that the 14 challenged ballots and Objections 1 through 6, 8 and 9 raised substantial and material

[52] R. Exh. 33.
[53] GC Exh. 3.
[54] Although Bryant's form had the "Dismissal" box marked, Ramirez admitted that he "made a mistake" and was supposed to check "Suspension." Box, which is consistent with the disciplinary action taken. (GC Exh. 2(c), 4(a)-(c); Tr. 433–434, 495, 500, 546–548, 787–789.)
[55] R. Exh. 34.

issues of fact, referred and consolidated them for a hearing in conjunction with the above-captioned unfair labor practice charges.

Legal Analysis

I. THE 8(A)(1) ALLEGATIONS

A. Interrogation

The amended complaint and Objection 3 of the petition allege that statutory supervisor Morales, on a date in April or early May 2016, interrogated employees about their union activities at the Westshore jobsite. Morales denied making such an inquiry, insisting that he actually welcomed Bontempo to the jobsite in order to distribute union shirts and beverages.

On or about April 18, Morales, witnessed Acevedo at the jobsite signing papers while in the company of Bontempo. At the time, Acevedo was signing insurance documents provided to him by Bontempo. During that same visit, Morales handed out union shirts, beverages and union applications. The following day, Morales asked Acevedo what papers he signed for Bontempo.

The Board considers the totality of the circumstances in determining whether the questioning of an employee constitutes an unlawful interrogation. *Rossmore House,* 269 NLRB 1176 (1984), enfd. sub nom. *Hotel Employees Union Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985). The Board has additionally determined that in employing the *Rossmore House* test, it is appropriate to consider the factors set forth in *Bourne v. NLRB,* 332 F.2d 47, 48 (2d Cir. 1964): whether there was a history of employer hostility or discrimination; the nature of the information sought (whether the interrogator sought information to base taking action against individual employees); the position of the questioner in the company hierarchy; the place and method of interrogation, and; the truthfulness of the reply. The *Bourne* factors should not be mechanically applied or used as a prerequisite to a finding of coercive questioning, but rather used as a starting point for assessing the totality of the circumstances. *Westwood Health Care Center,* 330 NLRB 935, 939 (2000).

The Company disseminated antiunion propaganda during the preelection period. However, prior to the filing of the representation petition, there was no history of hostility to the Union. To the contrary, the Company frequently requested referrals from the Union pursuant to an 8(f) relationship. The Company did express its intention not to renew that agreement when it expired on April 30. However, that decision was based on the Company's disagreement as to whether it was bound by an industry wide agreement and not by union animus. Moreover, the conversation took place prior to the Union's filing of its representation petition on April 29.

With respect to the nature of the information sought, there was no reasonable indication that Morales sought information upon which to take action against Acevedo. From Acevedo's perspective, Morales was asking about a transaction in which Acevedo signed insurance documents. Morales, Acevedo's foreman, merely approached in Acevedo in the parking lot prior to the start of work and Acevedo was not intimidated in the least by the inquiry, walking away without even answering Morales.

Under these circumstances, Morales's interrogation of Acevedo on or about April 18 was not unlawfully coercive. Accordingly, that complaint allegation is dismissed and Objection 3 of the petition is dismissed.

B. Threats

The complaint, as amended, and Objection 8 of the petition allege that during the preelection period in May 2016, Statutory Supervisor Feliz threatened a group of employees at the Westshore jobsite with reduced wages if they voted for the Union.

Feliz, an admitted statutory supervisor, told a group of seven or eight Spanish-speaking masons that they should vote against the Union, because the Union was taking their money. Feliz went on to say that if they "vote yes for union," their rate would go down to approximately $18 per hour. Luna, who testified at the behest of his employer, admitted that Feliz told the masons "the reasons why the Company did not want us to be with them...." Feliz's statement to employees that their wage rates would be reduced to $18 and change if the employees chose to be represented by the Union violated Section 8(a)(1) of the Act, as alleged in paragraph 6(a) of the complaint.

The Board has enumerated factors to consider in determining the severity of threats during the critical period: (1) the nature of the threat itself; (2) whether the threat encompassed the entire bargaining unit; (3) whether reports of the threat were widely disseminated within the unit; (4) whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat; and (5) whether the threat was rejuvenated" at or near the time of the election. *Westwood Horizons Hotel*, 270 NLRB 802 (I984); *see also PPG Industries*, 350 NLRB 225 (2007). Under this standard, the threat to decrease mason wages if they voted in favor of the Union is quite severe. The threat strikes to the heart of a mason's livelihood and would affect the entire bargaining unit, and it is bolstered by campaign literature directly linking an increase in mason paychecks with the Company no longer honoring the 8(f) agreement with the Union. With a tie vote, and one of the challenged votes in attendance at this meeting where up to eight other employees were present, wide dissemination of the threat is not necessary for it to have an effect on the election.

The same type of threat was made by Statutory Supervisor McNett during a mandatory safety meeting at the Westshore jobsite on May 16. During that meeting, McNett, who talked regularly about how the Union was tricking employees into signing up and was stealing their money, told employees that a union will probably not be good for wages.

McNett's comment during the critical preelection period was coercive. It sent a clear message to employees that the Company would reduce wages if the employees selected the Union, and the statement therefore violated Section 8(a)(1) of the Act.

C. Restrictions on Solicitation

Objection 9 by the Union alleged that the Company discriminatorily applied a solicitation policy to preclude Botempo and other union officials from communicating at the jobsites with masons. The Company denies the allegation, insisting that union representatives were permitted

to solicit employees at its jobsites prior to and after work time, and during lunch and other break periods.

Prior to the filing of the representation petition on April 29, 2016, company supervisors and Bontempo agreed that the latter would be permitted to solicit employees at jobsites prior to and after work, and during lunch and other breaks. As the campaign heated up, Bontempo strayed from his agreement by soliciting employees during worktime. On several occasions, company supervisors caught Bontempo soliciting employees during worktime. Each time he was told to stop and to resume solicitation during break and nonwork time. While there was testimony that the Company permitted employees to access food trucks in the parking lot, there is no indication that they permitted food vendors to access the jobsite during worktime. Moreover, the parking lot is the same location where Bontempo was permitted to wait for employees until they went to break time or got off from work.

Accordingly, the Company's enforcement of its longstanding solicitation policy during work time was proper under the circumstances and Objection 9 is overruled.

II. THE SECTION 8(A)(3) ALLEGATIONS

Paragraph 7 of the complaint and Objections 1 and 2 of the petition allege that the Company enforced its fall protection safety rules against Acevedo and Stevenson more strictly than normal by suspending them on March 16, 2016 and discharging them the following day because of Alvarez's strong support for the Union. The Company contends that enforcement of these rules was consistent with its enforcement of the rule and discipline of other employees.

Under Section 8(a)(3) of the Act, an employer may not discriminate with regard to hire, tenure, or any term or condition of employment in order to encourage or discourage membership in a labor organization. To determine whether adverse employment action was effected for prohibited reasons, the Board applies the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, to establish unlawful discrimination on the basis of union activity, the General Counsel must make an initial showing that antiunion animus was a substantial or motivating factor for the employer's action by demonstrating that: (1) the employee engaged in union activity; (2) the employer had knowledge of that union activity; and (3) the employer harbored antiunion animus. *Amglo Kemlite Laboratories*, 360 NLRB No. 51, slip op. at 7 (2014).[7] Proof of animus and discriminatory motivation may be based on direct evidence or inferred from circumstantial evidence. If the General Counsel makes his initial showing, the burden shifts to the employer to show that it would have taken the same action even in the absence of the protected activity. Id.

The evidence established that Company foreman became lax in their enforcement of the Company's fall protection policies, which were also required by OSHA regulations, while work was being performed outside of the UT structures. However, once the elevated masonry work went inside, McNett reiterated the Company's written "zero" tolerance policy with respect to fall protection.

The Company's stricter enforcement of its fall protection policy cannot be considered adverse action since it was mandated by law. Moreover, I am not convinced that the Company resumed enforcement of the policy solely because of the impending representation election or for the purpose of trapping Alvarez and Stevenson in a violation. Accordingly, that allegation and Objection 2 are dismissed.

The Company's enforcement of the fall protection policy against Alvarez and Stevenson, however, produces a different result. They initially experienced adverse action by being suspended. Given the timing just before the election, the action became even more suspicious when Feliz took the unusual step of discussing the incident with the Karps. As a result, Alvarez and Stevenson were discharged 23 days prior to the election for violating the fall protection policy. The Company knew that Acevedo was an active Union supporter and that he stood up to Feliz when the latter threatened lower wages. Stevenson was not an active Union supporter. However, I agree with the General Counsel's assertion that Stevenson, Acevedo's partner on May 16, was collateral damage, i.e., working alongside the wrong person at the wrong time.

In addition to the Company's knowledge of Acevedo's union activity, it harbored animus toward that activity. The Company's vigorous anti-union campaign demonstrates that it harbored animus toward the Union. Animus is further established by the Company's threats to reduce employee wage rates if they selected the Union as their collective bargaining representative. The Company's animus is most notably demonstrated by its disparate treatment of Acevedo and Stevenson following the filing of the Union's representation petition, by strictly enforcing its "zero tolerance" policy against them, while ignoring others who were not in compliance.

Even in the absence of union activity, the evidence revealed that prior to or after May 16 no other employees were discharged for failing to tie off "properly" as a first offense. A glaring example of such disparate treatment was when Bryant, also safety trained a month earlier, was observed working without a harness, but only sent home for the day.

Prior to May 16, the Company's safety policy was not zero tolerance, but rather, a tolerance of up to one or two fall protection violations. Carollo was charged with two fall protection violations, but was not discharged until his third offense. The decision to discharge Carollo following a third safety violation is consistent with the Company's safety policy as reported to the Florida unemployment compensation agency. In that regard, the Company stated that its policy was to issue warnings to employees for their first two safety violations and only discharge after the third safety violation. Similarly, after a second fall protection violation, Haser was merely sent home until he attended safety orientation again.

The discharges of Golphin and Leonardo were not comparable to those of Alvarez and Stevenson. Also discharged based on one incident, Golphin and Leonardo were each guilty of severe compound violations—failing to anchor their harnesses while simultaneously engaging in another safety violation.

The evidence of disparate treatment, combined with the timing of the suspensions and discharges shortly after Acevedo challenged Feliz about the merits of union representation during the peak of the pre-election period, provides a causal connection between the Company's anti-Union animus and the decision to selectively enforce its fall protection policy and discharge

Acevedo and Stevenson. Under the circumstances, it is evident that Acevedo and his partner at the time, Stevenson, would not have been suspended and then discharged in the absence of Alvarez's protected conduct.

Accordingly, the suspension and discharges of Alvarez and Stevenson, occurring during the critical pre-election period as the result of the Company's discriminatory enforcement of its fall protection policy, were a pretext. The Company's motivation in terminating Alvarez and, by association, Stevenson, in retaliation for Alvarez's support for the union was retaliatory and calculated to prevent him from voting in the representation election and restrain others from voting for the Union.

In determining whether to set aside election results the Board considers a number of factors, such as (1) the number of incidents of misconduct; (2) the severity of incidents and whether they were likely to cause fear among unit employees; (3) the number of employees in the unit subject to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree of persistence of the misconduct in the minds of unit employees; (6) the extent of dissemination of the misconduct; (7) the closeness of the vote; and 8) the degree to which the misconduct can be attributed to the party. See *Cedar-Sinai Medical Center*, 342 NLRB 596, 597 (2004).

When considered in conjunction with the Company's coercive statements threatening lower wages if employees voted for the Union, the discharge of Alvarez, an open supporter of the Union, clearly had an effect on the outcome of the election. It is well settled that conduct in violation of Section 8(a)(1) that occurs during the critical period prior to an election is "a fortiori, conduct which interferes with the exercise of a free and untrammeled choice in an election." The Board will thus set aside an election unless the 8(a)(1) violation is so minimal or isolated that it is virtually impossible to conclude that the misconduct could have affected the election results. E.g., *Iris U.S.A., Inc.*, 336 NLRB 1013 (2001).

Under the circumstances, the Company's actions violated Section 8(a)(3) and (1) of the Act as alleged in paragraph 7 of the amended complaint and constituted objectionable conduct as alleged at Objection 2. Objection 1 is overruled.

In the event that the Union does not prevail after the additional 10 challenged votes are counted, the Section 8(a)(3) and (1) violation, which was also alleged as election Objection 2, warrants setting aside the election.

III. THE CHALLENGED BALLOTS

The Company challenged the ballots cast by Luis Acevedo, Robert Harvey, Raymond Pearson, John Smith, and Walter Stevenson, on the basis that they were discharged for cause. The Company also challenged the ballots cast by Robert Baker, Jacob Barlow, Jeremy Clark, Mark France, Forest Greenlee, Dustin Hickey, Robert Pretsch, George Reed, and David Wrench on the basis that they quit their jobs.

It is well established that the burden of proving that an employee is ineligible to vote rests with the party asserting the challenge. *Sweetener Supply Corp.*, 349 NLRB 1 122 (2007). The Company's ability to meet such a challenge with respect to Alvarez and Stevenson is precluded by the law of the case, i.e., they were unlawfully terminated after the Company discriminatorily enforced its fall protection policy against them because Alvarez engaged in protected conduct during the pre-election period. Accordingly, Alvarez and Stevenson were eligible to vote and their votes should be counted.

With respect to the following employees, there was insufficient credible evidence to satisfy the Company's burden with respect to their challenged ballots, thus, they were laid off by the Company with a reasonable expectation of rehire and their votes should be counted: John Smith, David Wrench, Jacob Barlow, Dustin Hickey, Forest Greenlee, Jeremy Clark, George Reed and Raymond Pearson. The RFL forms produced by the Company purporting to show that each voluntarily quit were simply not reliable. In addition to other factors previously mentioned, these documents were not provided to the employees and they did not have an opportunity to dispute the accuracy of the representations therein. Under the circumstances, I gave these documents little weight in determining whether an employee quit or was laid off. See *N.L.R.B. v. Cal-Maine Farm, Inc.*, 998 F. 2d 1336, 1343(5th Cir. 1993) (self-serving business records received in evidence but trier-of-fact gave disputed contents little weight).

The little weight that I gave such documents did enable the Company, however, to meet its burden in establishing that the remaining employees voluntarily quit or were discharged for cause prior to the election and their votes should not be counted: Robert Harvey, Robert Baker, Mark France and Robert Pietsch.

IV. THE EXCELSIOR LIST

The Union contends at Objections 4 and 5 that the Company submitted an inaccurate or incomplete Excelsior List and improperly included additional lists to the list after it was produced to the Union. Both objections concern the

Employers are required to provide complete and accurate information as required by *Excelsior Underwear, Inc.* 156 NLR B 1236 (1966). Pursuant to Section 102.62(d) the Board Rules and Regulations, an employer must provide a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular telephone numbers) of all eligible voters. Moreover, an employer's failure to provide the list in proper format shall be grounds for setting aside the election upon timely objection.

Although the Company provided a voter list within the required two business days of the Stipulated Election Agreement, the list undisputedly did not include seven employees—Raymond Pearson, Robert Baker, Mark France, Robert Harvey, Robert Pietsch, George Reed and David Wrench—who worked a sufficient number of hours for the Company in order to satisfy the *Steiny/Daniel* eligibility formula agreed to by the parties. However, France, Baker, Harvey and Pietsch voluntarily resigned from Company projects prior to the election and, thus, were rendered ineligible to vote. The remaining three employees—Pearson, Reed and Wrench were laid off and clearly satisfy the *Steiny/Daniel* eligibility formula. There was undisputed

testimony that employees typically work an eight hour work day, and Company payroll records corroborate this testimony as they clearly identify hours as regular or overtime for each employee in question.

By intentionally omitting three employees required to be included on the voter eligibility list in some capacity in direct violation of Rules and Regulations of the National Labor Relations Board §102.62(d), the Company committed objectionable conduct affecting the results of the election. *See Shore Health Care Ctr.,* 323 NLRB 990 (1997) (election directed where voter eligibility list omitted only 5% of the names and there was evidence of intentional conduct on the part of the Employer). In this case, where there was tied vote, even the omission of one eligible voter ultimately affected the results of the election.

The Union refers to the Company's untimely attempts to frustrate the intent of the law by seeking to add and remove employees from the list after the initial list was field. The Regional Office, however, conducted the election based on the only timely *Excelsior* list and the Company's efforts to alter the list were unsuccessful.

In situations where the results of the vote are a tie and there are fourteen challenges, three of whom were omitted from the voter eligibility list, the Company's conduct certainly has an effect on the results of the election. See *Woodman's Food Markets, Inc.,* 332 NLRB 503 (2000) (Board gives substantial weight to the number of eligible voters omitted from the eligibility list when they are sufficient in number to affect the results of the election). *Special Citizens Futures Unlimited, Inc.,* 331 NLRB 160 (2000); *Thrifty Auto Parts, Inc.,* 295 NLRB I1 18 (1989); *Gamble Robinson Co.,* 180 NLRB 532 (1970). By its actions, the Company failed to substantially comply with the Board's *Excelsior* requirements, the election should be overturned and a new one scheduled. *Shore Health Care Ctr.,* 323 NLRB 172, 323 NLRB 990 (1997).

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening or implying that employees' wages will go down if they select the Union, the Company violated Section 8(a)(1) of the Act.

4. By suspending Luis Alvarez and Walter Stevenson on May 16, 2016 and discharging them on May 17, 2016 because Luis Alvarez supported the Union, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. The aforementioned unfair labor practices affected commerce within the meaning of Section 2(6) and (7) of the Act.

6. The challenged votes of Luis Alvarez and Walter Stevenson, unlawfully discharged, should be counted. In addition, the challenged votes of the following laid-off employees should be counted: John Smith, David Wrench, Jacob Barlow, Dustin Hickey, Forest Greenlee, Jeremy

Clark, George Reed and Raymond Pearson. Robert Harvey, Robert Baker, Mark France and Robert Pietsch voluntarily resigned from the Company during the *Steiny-Daniel* period and their votes should not be counted.

7. The Company's conduct during the critical pre-election period, as alleged at Objections 1, 4, 5 and 8, was objectionable and tended to interfere with the election. Objections 2, 3 and 9 are overruled.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact, conclusions of law and the record as a whole, I shall recommend that the challenged votes of Luis Alvarez, Walter Stevenson, John Smith, David Wrench, Jacob Barlow, Dustin Hickey, Forest Greenlee, Jeremy Clark, George Reed and Raymond Pearson be counted; (2) that the challenges to votes cast by Robert Harvey, Robert Baker, Mark France and Robert Pietsch be sustained; and that Objections 2, 4, 5 and 8 be sustained, while Objections 1, 3 and 9 should be overruled.

Based on the unfair labor practices, as well as the closeness of the results of the election, I shall recommend that a new election be directed if the Union does not prevail after the votes of the aforementioned 10 former employees are counted. See *Kingspan Benchmark*, 359 NLRB No. 19 (2012) (election set aside where the election results were close and the employer granted an employee a wage increase, implemented a shift differential and interrogated an employee).

Based on the foregoing, I issue the following recommended[56]

ORDER AND RECOMMENDATIONS

The Respondent, Advanced Masonry Associates, LLC d/b/a Advanced Masonry Systems, of Sarasota, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening or implying that employees' wages will go down if they select the Union as their collective bargaining representative.

(b) Discharging or otherwise discriminating against its employees because they engaged in union or other protected concerted activity or to discourage them from voting in a representation election.

[56] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) The Respondent, having discriminatorily suspended and discharged Luis Acevedo and Walter Stevenson, must offer them full reinstatement as masons on the next available project and make them whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

(b) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(c) The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

(d) Within 14 days after service by the Region, post copies of the attached notice marked Appendix[57] in both English and Spanish at its all of its active job sites and mail said notices, at its own expense, to all employees of the attached notice, at its own expense, to all bricklayers and masons employed who were employed by the Respondent at its Florida jobsites at the University of Tampa in Tampa, Florida Bethune-Cookman University in Daytona Beach, Westshore Yacht Club in Tampa, the Hermitage in St. Petersburg, and the Holiday Inn Express in St. Petersburg at any time from the onset of the unfair labor practices found in this case until the completion of these employees' work at that jobsite. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent's authorized representative.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the amended complaint is dismissed insofar as it alleges violations of the Act not specifically found.

IT IS RECOMMENDED that (1) the challenged votes during the June 9, 2016 labor representation election of Luis Alvarez, Walter Stevenson, John Smith, David Wrench, Jacob Barlow, Dustin Hickey, Forest Greenlee, Jeremy Clark, George Reed and Raymond Pearson be

[57] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

counted; (2) the challenges to votes cast by Robert Harvey, Robert Baker, Mark France and Robert Pietsch be sustained; (3) Objections 1, 4, 5 and 8 be sustained; and (4) Objections 2, 3 and 9 be overruled.[58]

Dated, Washington, D.C. May 10, 2017

[58] Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, DC within 14 days from the date of issuance of this Report and recommendations. Exceptions must be received by the Board in Washington DC by May 24, 2017.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you s because you engage in union or other protected concerted activity in order to discourage you from voting in a representation election.

WE WILL NOT threaten or imply that your wages will go down if you select the Union as your collective bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Luis Acevedo and Walter Stevenson reinstatement as masons on our next available project.

WE WILL make Luis Acevedo and Walter Stevenson whole for any loss of earnings and other benefits resulting from their unlawful discharges on May 17, 2016, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Luis Acevedo and Walter Stevenson for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Luis Acevedo and Walter Stevenson, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

ADVANCED MASONRY ASSOCIATES, LLC
d/b/a ADVANCED MASONRY SYSTEMS

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

South Trust Plaza, 201 East Kennedy Boulevard, Ste 530, Tampa, FL 33602-5824
(813) 228-2641, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/12-CA-176715 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (813) 228-2345.